Supreme Court, U.S.
FILED

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No. 02-

IN THE

Supreme Court of the United States

WILLIAM J. CONERY,

Petitioner,

v.

JOHN NICCOLLAI, JR., individually and in his official capacity as President of Local 464A, Food and Commercial Workers Union, AFL-CIO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether respondent union's deliberate actions to suppress petitioner/member's dissenting activities, by repeatedly threatening him with physical violence, preventing him from distributing critical leaflets, placing him under constant surveillance, and subjecting him to a series of unfounded internal union disciplinary proceedings and frivolous lawsuits, constitute *per se* violations of Title I of the LMRDA?

2. Whether respondent union, after having deliberately engaged in a succession of purposeful actions to suppress petitioner/member's dissenting activities, is absolved from the statutory claims asserted by petitioner that his Title I rights had been violated, simply because petitioner persisted in his opposition to the entrenched union leadership notwithstanding the union's repressive actions?

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Petitioner respectfully submits that a writ of certiorari should issue to review the Judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 34 Fed. Appx 839, 2002 WL 517293 (3d Cir. 2002) and is reprinted in Appendix A at 1a. The District Court's slip opinion in 92 Civ. 840 (D.N.J. March 31, 1998) is reprinted in Appendix B at 10a. The Magistrate Judge's Report and Recommendation is reprinted in Appendix C at 12a. The Order of the Court of Appeals denying rehearing and *en banc* review is reprinted in Appendix D at 33a.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals affirming the District Court's opinion of March 31, 1998 was dated and entered on April 4, 2002. The Order of the Court of Appeals denying petitioner's motion for rehearing and *en banc* review was dated and entered on May 9, 2002. This petition is timely filed within 90 days of the Order of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner first invoked federal court jurisdiction in the case under 28 U.S.C. §§ 1331 and 1337 and 29 U.S.C. § 412.

STATUTES AND REGULATIONS INVOLVED

The statute involved in this case is Title I of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411. The pertinent text of this statute is set forth in Appendix E at 38a.

STATEMENT OF THE CASE

Petitioner William J. Conery ("Conery") was at all relevant times a union butcher for Shop Rite Supermarkets, Inc. ("Shop Rite"). Conery joined respondent Local 464A, United Food Commercial Workers Union ("the union") in 1956, and subsequently became an active union member, serving as a union shop steward for 15 years.

Conery's problems with the union began in 1987 when he declared his candidacy for a position on the elected contract negotiating committee and composed a leaflet entitled "Union Renewal" which was critical of the union president, respondent John Niccollai Jr. ("Niccollai"), and other incumbent union officers. Prior to the April 1987 membership meeting at which Conery succeeded in being elected to the negotiating committee, Niccollai told him that if he passed out his leaflet at that meeting "I'll throw your fuckin ass out of here, you fuckin cocksucker. This shit is anti-union. If you pass this out in the meeting, I'm throwing you out." Other candidates distributed their leaflets at the meeting but Conery, intimidated by Niccollai's threats, did not distribute his critical leaflet.

From that point on the relationship between Conery and the union establishment rapidly deteriorated. During the ensuing years, Conery was subjected to continuous harassment by the union intended to stifle his persistent challenges to the entrenched union leadership. Such harassment included the repeated suppression of Conery's leaflet distributions, constant surveillance, numerous threats of physical violence, baseless union disciplinary proceedings and frivolous lawsuits including a $9,000,000 RICO action which alleged that Conery's dissident activities, including running for president, were really an attempt at extortion. On one occasion, Niccollai called Conery at work

and told him to "back off, asshole, or I'll get you." He also told Conery that he didn't "want any more of that shit passed out, and I'm not going to warn you again . . . I'll bring you to your knees and bury you once and for all . . . your job is on the line." On yet another occasion, Niccollai called Conery at work, and while on speaker phone in the presence of other union employees, told him he would "get" him and that "the game had just begun."

The union's harassment of Conery escalated into death threats and resulted in his nervous breakdown and extended hospitalization. Conery's hospitalization forced him to abandon his election campaign for union president in the 1989 union election. Nonetheless, in spite of the union's unrelenting campaign to intimidate him, Conery persisted in challenging the union leadership after 1989 through his leaflets and participation in union elections.

The union deliberately publicized its harassment of Conery in order to chill the interest of other members in pursing their Title I rights to oppose the union leadership. To this end, Niccollai arranged for his threats to Conery to be heard by other Shop Rite worker/members over the store's public address system and the union's secretary-treasurer personally served Conery with process in the frivolous RICO suit at the Shop Rite facility in the presence of many of Conery's co-workers.

I. PETITIONER CONERY'S COMPLAINT

In his February 24, 1992 complaint, Conery asserted that the defendants had violated his rights and those of other union members under Title I of the LMRDA by a succession of harassing actions, including threats of violence, photographic

surveillance, disruption of leaflet distributions, and the filing of baseless internal union charges and frivolous civil and criminal complaints against him.

II. THE DISTRICT COURT'S SUMMARY JUDGMENT ORDER

The District Court granted summary judgment for defendants based on the Report and Recommendation ("the Report") of the designated Magistrate Judge.

III. THE COURT OF APPEALS' DECISION

The Third Circuit affirmed, invoking *Calhoon v. Harvey*, 379 U.S. 134 (1964) as holding (a) that the provisions of LMRDA, § 101(a)(1), 29 U.S.C. § 411(a)(1) are narrow in scope and (b) that there can be no violation of § 101(a)(1) unless the complaining union member has been denied the right to nominate or vote, and citing *Sheet Metal Workers Int'l Assoc. v. Lynn*, 488 U.S. 347 (1989) as holding that a violation of a union member's free speech rights, by itself, is insufficient to violate § 101(a)(2).

REASONS FOR GRANTING THE WRIT

A. THE CONFLICT IN THE CIRCUITS WITH RESPECT TO THE THIRD CIRCUIT'S NARROW CONSTRUCTION OF TITLE I OF THE LMRDA

The affirmance by the Third Circuit not only conflicts in several respects with the rulings of other Circuits in its construction of Title I of the LMRDA, but also misapprehends and misapplies the decisions of the Supreme Court addressing that remedial statute.

The Third Circuit's holding that the provisions of Title I must be narrowly construed conflicts with the broad construction accorded Title I by other circuits, and is plainly refuted by the legislative history of the statute and the decisions of this Court.

Other circuits have consistently held that Congress enacted the LMRDA to shield union members from arbitrary, autocratic, and despotic control by union officers and leaders.[1] *Burroughs v. Operating Engineers Local 3*, 686 F.2d 723, 727 (9th Cir. 1982); *Schuchardt v. Millwrights and Machinery Erectors Local Union No. 2834*, 380 F.2d 795, 797 (10th Cir. 1967). Those circuits have followed the Court's decision in *Hall v. Cole*, 412 U.S. 1, 7 (1973), which stressed the importance of judicial protection of the rights enumerated in Title I:

> The Labor-Management Reporting and Disclosure Act of 1959 was based, in part, on a congressional finding "from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption,

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1. Congress chose to characterize members' rights under Title I in broad terms such as the right "to attend membership meetings," "the right to meet and assemble freely with other members," and the right "to express any views, arguments, or opinions." 29 U.S.C. §§ 411(a)(1) and (2). Congress specifically rejected one bill which contained a detailed Bill of Rights section, thirty pages in length, opting instead for the more general provisions that broadened members' rights. H.R. 4773. *See* Labor-Management Reform Legislation hearing on H.R. 3540, H.R. 3302, H.R. 4473 before a Joint Subcomm. of the House. Comm. on Education and Labor, 86th Cong., 1st Sess. 1475 (1959).

> disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct. . . ." 29 U.S.C. § 401(b). . . . Thus, Title I of the LMRDA – the "Bill of Rights of Members of Labor Organizations" – was specifically designed to promote the "full and active participation by the rank and file in the affairs of the union," and, as the Court of Appeals noted, the rights enumerated in Title I were deemed "vital to the independence of the membership and the effective and fair operation of the union as the representative of its membership." (footnotes omitted) *Id.* at 7.

Other circuit courts, recognizing the remedial nature of Title I, have liberally construed the rights contained therein. *See Smith v. United Mine Workers*, 493 F.2d 1241 (10th Cir. 1974); *Brotherhood of Boiler Makers v. Braswell*, 388 F.2d 193 (5th Cir. 1968), *cert. den*, 391 U.S. 935 (1968); *Marshall v. Local 1010, United Steelworkers*, 498 F. Supp. 368 (N.D. Oh. 1980), *aff'd*, 664 F.2d 144 (7th Cir. 1981). In *Marshall*, the court stated:

> The vice which the statute was to correct . . . was the use by the union officers of the "single power of their offices to emasculate challenges to their leadership by the rank and file, and thereby perpetuate dynastic control. The statute should be read and applied to correct the vice of dynastic control, not to perpetuate it." *Id.* at 378.

The Third Circuit cites *Calhoon v. Harvey*, 379 U.S. 134 (1964) as calling for a narrow construction of § 101(a)(1). But *Calhoon* was a jurisdictional case and did not involve

free speech rights. In *Calhoon*, the Court held that Title IV of the LMRDA, rather than § 101(a)(1), governed the claim that a union's nomination process was invalid and that a member challenging a union eligibility rule for candidates had to proceed in accordance with the requirements of Title IV, by first pursuing his administrative remedies within the union and, subsequently, at the Department of Labor.[2] *Calhoon* does not even tangentially concern § 101(a)(2), the free speech protections which are central to Conery's claim. Moreover, the Court in *Calhoon* recognized the remedial nature of the LMRDA. As Justice Stewart stated:

> Repeated attempts were made by representatives of organized labor, among other groups, to have the strict mandate of this so-called Bill of Rights modified, or eliminated altogether. Despite these efforts to remove Title I, it endured, and indeed was amended to provide stronger remedial provisions than those contained in the original version.

Id. at 144 (Stewart, J., concurring). It is black letter law that remedial statutes are to be liberally construed.

The implication in the Third Circuit's holding that the free speech provisions of § 101(a)(2) apply only in the context of a union election (and then only to those members who, because of union harassment, are dissuaded from participating in such election) conflicts with decisions in the

2. This holding was narrowed in a subsequent case which held that § 101(a)(1) was applicable to the election process as long as the court intervention did not interfere with an ongoing election. *Crowley v. Teamsters Local 82*, 467 U.S. 526 (1984).

following circuits: *Guzman v. Bevona*, 90 F.3d 641 (2d Cir. 1996); *Black v. Ryder/P.I.E. Nationwide*, 970 F.2d 723 (6th Cir. 1992); *Aircraft Mechanics v. Transport Workers Union*, 98 F.3d 597 (10th Cir. 1996); *Guidry v. International Union of Operating Engineers, Local 406 et al.*, 882 F.2d 929 (5th Cir. 1989), *reh'g denied*, 887 F.2d 1083 (5th Cir.), *cert. granted, judgment vacated on other grounds*, 494 U.S. 1022, 110 S. Ct. 1465 (1990), *on remand*, 907 F.2d 1491 (5th Cir. 1990).

In *Guidry*, *supra*, the Fifth Circuit stated:

> The flaw in the defendants' argument is their assumption that in order to assert a violation of section 101(a)(2) of the LMRDA, a plaintiff must show that he or she spoke out in opposition to Union leadership in the context of an election. . . . The statute itself speaks of the right of every union member to "express any views, arguments or opinions," 29 U.S.C. § 411(a)(2) . . . and does not limit such expression to one occurring in the context of a union election. In fact, the statute refers separately to a union member's right to express his views upon candidates running for union office. 882 F.2d at 936.

Plainly, a union member's right to express views and opinions without retaliation applies to all internal union debate, not just electioneering. As the Tenth Circuit noted in *Aircraft Mechanics*, *supra*:

> The Supreme Court has on numerous occasions consistently identified the paramount purpose of § 411(a)(2), and the LMRDA generally, to be that

of assuring rank-and-file members' democratic participation in intra-union affairs, such as voting in union elections, standing for union office, and approving (or challenging) official union policies and decisions. See, e.g., *Reed v. United Transp. Union*, 488 U.S. 319, 325, 109 S. Ct. 621, 625-26, 102 L. Ed. 2d 665 (1989); *Sadlowski*, 457 U.S. at 112, 102 S. Ct. at 2346 (majority op.), 122-23, 102 S. Ct. at 2350-51 (White, J., dissenting); *Finnegan v. Leu*, 456 U.S. at 435-37, 102 S. Ct. at 1870-72; *Hall v. Cole*, 412 U.S. 1, 14; 93 S. Ct. 1943, 1950-51, 36 L. Ed. 2d 702 (1973). Members' free speech rights are, accordingly, seen as a necessary means for the "improvement or preservation of democracy *within the union*." *Reed*, 488 U.S. at 326, 109 S. Ct. at 626 (emphasis added); see also *Sadlowski*, 457 U.S. at 112, 102 S. Ct. at 2346 ("democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal"). 98 F.3d at 600.

B. THE UNION'S DELIBERATE ACTIONS TO SUPPRESS CONERY'S AND OTHER MEMBERS' DISSENTING ACTIVITIES VIOLATES TITLE I OF THE LMRDA REGARDLESS OF WHETHER CONERY PERSISTED IN HIS OPPOSITION NOT-WITHSTANDING THE UNION'S REPRESSIVE ACTIONS

The Third Circuit in this case held that the free speech guarantees of Title I provide a statutory cause of action only for dissenting union members who succumb to union

harassment, but not for the Conerys of this world who bravely persist to the end by running for union office and supporting opposition candidates.[3] We find no decisions in other circuits which support this novel interpretation of the LMRDA. Certainly nothing in the Court's decision in *Sheet Metal Workers Int'l. Assoc. v. Lynn*, 488 U.S. 347 (1989), upon which the Third Circuit relies, gives support to this counter-intuitive interpretation of Title I.

In *Lynn*, the Court addressed the question of whether the removal of *elected* business agents violated Title I in view of the Court's prior holding in *Finnegan v. Leu*, 456 U.S. 431 (1982) that a newly elected union president could remove *appointed* business agents without violating Title I. In *Finnegan*, the Court reasoned that denying an elected union officer the right to appoint business agents who shared his philosophy would undermine the democratic governance of the union. Distinguishing *Finnegan*, the Court held in *Lynn* that the retaliatory removal of an elected officer stated a cause of action under § 101(a)(2):

> Furthermore, the potential chilling effect of Title I free speech rights is more pronounced when elected officials are discharged. Not only is the fired official likely to be chilled in the exercise of his own free speech rights, but so are the members who voted for him. See *Hall v. Cole*, 412 U.S. 1, 8, 93 S. Ct. at 1947-48, 36 L. Ed. 2d 702 (1973). Seeing Lynn removed from his post just five days after he led the fight to defeat yet another dues

3. The Third Circuit misconstrued the record in this regard since the harassment that Conery endured, in fact, caused him to be institutionalized in a mental health facility, thus preventing him from continuing his campaign for union president.

> increase proposal, other members of the Local may well have concluded that one challenged the union's hierarchy, if at all, at one's peril. This is precisely what Congress sought to prevent when it passed the LMRDA. "It recognized that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal." *Sadlowski*, 457 U.S. at 112, 102 S. Ct. at 2346, 72 L. Ed. 2d 707. 488 U.S. at 355.

Lynn plainly does not stand for the proposition that union dissidents may be harassed with impunity because "the democratic governance of the union is not affected."

However, other decisions of this Court teach us that where a union member's free speech rights under § 101(a)(2) have been violated, even if no actual injury results from the denial of such rights, at least nominal damages must be awarded.

In *Reed v. United Transportation Union*, 488 U.S. 319, 334 (1989), which determined the statute of limitations governing Title I claims, the Court noted that § 101(a)(2) was "modeled on the First Amendment to our Constitution," and analogized § 101(a)(2) claims to §1983 claims. In *Carey v. Piphus*, 435 U.S. 247 (1978), the Court held that a plaintiff in a § 1983 action could recover compensatory damages if he proved actual injury caused by the denial of his constitutional rights, but could recover nominal damages without such a showing. The Court stated:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are

> not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights. (footnote omitted). 435 U.S. at 266.

Furthermore, it can be presumed that other members, aware of the union's harassment of Conery, including the RICO lawsuit against him, were chilled in exercising their Title I rights. This is particularly true in this case where the union made a point of publicly chastising Conery by threatening him at work over a public address system and having a union officer personally serve him with a nine million dollar lawsuit in front of his co-workers. *See, e.g., Bill Johnson's Restaurant, Inc. v. NLRB*, 461 U.S. 731, 741 (1983).

C. THE COURT SHOULD RESOLVE THE FOREGOING CIRCUIT SPLITS BECAUSE SUCH RESOLUTION IS VITALLY IMPOR-TANT TO UNION MEMBERS AND THEIR UNIONS NATIONWIDE

The vigorous enforcement of the Title I rights of union members is of immediate and vital concern to workers, unions, employers and the federal and state courts throughout the country. Moreover, the questions considered and determined in this case are not limited to Title I guarantees but impact upon the enforcement of the whole array of legislation to protect workers.

CONCLUSION

For the reasons above set forth, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED APRIL 4, 2002

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 01-2870

WILLIAM J. CONERY; FRANK A. FUSCO;
KENNETH BURDGE

v.

JOHN NICCOLLAI, JR., individually and in his official capacity as President of Local 464A, Food and Commercial Workers Union, AFL-CIO; RAMON RANDO, individually and in his official capacity as Secretary-Treasurer of Local 464A; GRIFF MCELROY, individually and in his capacity as Recorder of Local 464A; GEORGE PLESA, individually and in his official capacity as Chairman of the Executive Board of Local 464A; FRANK HANLEY, individually and in his official capacity as Contract Administrator; FRANK DICHRISTINA; DONALD LIGON; WILLIAM WRIKER, individually and in their official capacities as Business Agents of Local 464A; UNITED FOOD COMMERCIAL WORKERS UNION, AFL-CIO; SHOPRITE SUPER-MARKETS, INC.; WALTER BIERNACKI, individually and in his official capacity as Vice President of Local 464A; WAYNE WILLIAMS, individually and in his capacity as Director-Pension & Prescription Benefits of Local 464A; JOHN T. NICCOLLAI, SR., individually and in his capacity as Trustee of the Local 464A Pension Fund; Local 464A, UNITED FOOD AND COMMERCIAL WORKERS

Appendix A

INTERNATIONAL UNION, AFL-CIO; LOCAL 464A PENSION FUND ADMINISTRATOR AND BOARD OF TRUSTEES; MARTIN QUINN, in their capacity as administrators and trustees of the Local 464A Pension Fund; GILBERT C. VUOLO, in their capacity as administrators and trustees of the Local 464A Pension Fund; DEWEY CANNELLA, in their capacity as administrators and trustees of the Local 464A Pension Fund; ISADORE ZALKIN, in their capacity as administrators and trustees of the Local 464A Pension Fund,

v.

JOHN NICCOLLAI, JR.; RAMON RANDO; GRIFF MCELROY; GEORGE PLESA; FRANK HANLEY; FRANK DICHRISTINA; DONALD LIGON; WILLIAM WRIKER; WAYNE WILLIAMS; JOHN T. NICCOLLAI, SR.; MARTIN QUINN; GILBERT C. VUOLO; DEWEY CANNELLA; ISADORE ZALKIN; WALTER BIERNACKI,

Third Party Plaintiffs,

v.

HAROLD KRIEGER, The Estate of Harold Krieger; STEPHANIE KRIEGER; LOWELL HARDWOOD, as Executors of the Estate of Harold Krieger,

Third Party Defendants.

Appendix A

(D.C. No. 92-cv-00840)

FRANK A. FUSCO; KENNETH BURDGE,

v.

JOHN T. NICCOLLAI, JR., individually and in his capacity as President of local 464A, United Food and Commercial Workers International Union, and as Trustee of the Local 464A Pension Fund; RAMON RANDO, individually and in his capacity as Secretary-Treasurer of Local 464A and as Trustee of the Local 464A Pension Fund; GRIFF MCELROY, individually and in his capacity as Recorder of Local 464A; FRANK HANLEY, individually and in his capacity as Contract Administrator of Local 464A; WAYNE WILLIAMS, individually and in his capacity as Director-Pension & Prescription Benefits of Local 464A; JOHN T. NICCOLAI, SR., individually and in his capacity as Trustee of the Local 464A Pension Fund; Local 464A, United Food and Commercial Workers International Union, AFL-CIO; LOCAL 464A PENSION FUND ADMINISTRATOR AND BOARD OF TRUSTEES; WALTER BIERNACKI, individually and in his capacity as Vice President of Local 464A and as Trustee of the Local 464A Pension Fund; MARTIN QUINN, in their capacity as administrators and trustees of the Local 464A Pension Fund; GILBERT C. VUOLO, in their capacity as administrators and trustees of the Local 464A Pension Fund; DEWEY CANNELLA, in their capacity as administrators and trustees of the Local 464A Pension Fund; ISADORE ZALKIN, in their capacity as administrators and trustees of the Local 464A Pension Fund.

Appendix A

(D.C. No. 92-cv-01458)

William J. Conery,

Appellant

Appeal from the United States District Court
for the District of New Jersey, Newark
(D.C. Civ. Nos. 92-CV-840 & 92-CV-1458)

Before: SCIRICA and COWEN, *Circuit Judges*,
RESTANI*, *Judge*, United States Court of
International Trade

(Filed April 4, 2002)

OPINION

RESTANI, *Judge*.

On March 31, 1998, the District Court granted summary judgment for defendants based on the Report and Recommendation ("Report"), dated January 14, 1998, of Magistrate Judge G. Donald Haneke. Previously, on September 26, 1994, the District Court had granted defendants' partial summary judgment as to Conery's malicious prosecution claims.

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* Honorable Jane A. Restani of the United States Court of International Trade, sitting by designation.

Appendix A

STATEMENT OF FACTS

This appeal arises out of claims brought by William J. Conery, Kenneth Burdge and Frank Fusco against various officers of Local 464A, United Food and Commercial Workers Union ("Local 464A") for allegedly engaging in a continuous and systematic campaign of harassment to prohibit Conery and other union members from exercising their rights under the Labor Management Reporting and Disclosure Act ("LMRDA") and National Labor Relations Act ("NLRA") in order to suppress dissent within Local 464A.

In 1982, defendant John T. Niccollai, Jr. was appointed to his position as President of defendant Local 464A as a result of the death of the former president. Defendant Niccollai was re-elected President in 1983, 1986, 1989, 1992 and 1995. Conery maintains that various officers of Local 464A organized and executed a campaign of harassment against him in response to Conery's dissident activities in Local 464A, including Conery's decision to run for president in Local 464A's elections in 1989 and 1992. According to Conery, this harassment included (a) the filing of a civil RICO lawsuit in retaliation for Conery's dissident union activities; (b) the filing of an assault charge in Municipal Court to "convince" him to stop participating in union affairs; and (c) the verbal and physical harassment of Conery dating back to April of 1987 in order to suppress dissent within the union.[1]

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1. The factual and background statements are adopted from the Report, which we find to be correct in its essentials.

Appendix A

DISCUSSION

Conery asserts violations of his rights under Sections 101(a)(1)(2) and (4) of the LMRDA, 29 U.S.C. §§ 411(a)(1)(2) and (4). Section 101(a)(1) was intended to guarantee union members the right to participate in Union campaigns and elections and to attend membership meetings. That section provides:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums or a labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

LMRDA § 101(a)(1), 29 U.S.C. § 411(a)(1). The United States Supreme Court has held that the provisions of § 101(a)(1) are narrow in scope. *Calhoon v. Harvey,* 379 U.S. 134, 138-39 (1964). The *Calhoon* Court explained that § 101(a)(1) is:

> no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote. And Congress carefully prescribed that even this right against discrimination is "subject to reasonable rules and regulations by the union."

Id. A cause of action by a union member cannot be sustained under § 101(a)(1) without some claim of discrimination and some demonstration that the plaintiff has been denied the right to nominate or vote. *Id.*

Section 101(a)(2) was intended to guarantee union members the right to express their views and opinions regarding union elections and officers. That section provides in relevant part:

> Every member of any labor organization shall have the rights . . . to express any views, arguments or opinions . . . Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2). Nevertheless, the Supreme Court has held that a violation of free speech rights by itself is insufficient to violate § 101(a)(2). *Sheet Metal Workers' Int'l Assoc. v. Lynn,* 488 U.S. 347, 353 (1989). The infringement on free speech must be viewed with reference to the basic objective the LMRDA. *Id.* That objective is "to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open periodic elections." *Finnegan v. Leu,* 456 U.S. 431, 441 (1982).

Appendix A

As set forth in detail in the Report, Conery participated fully in union elections and spoke his mind. He ran for office and supported other candidates. None of the actions of the Local 464A officials interfered with Conery's rights to vote for and nominate candidates, nor did he present evidence establishing interference with the democratic governing of the union. The Report did not mischaracterize the facts or misinterpret the law and was properly adopted by the District Court.

29 U.S.C. § 411(a)(4) forbids union officials from barring its members from instituting legal proceedings. Apparently, Conery's claim under § 411(a)(4) relates to attempts to forestall further complaints to the NLRB. Conery did not discuss § 411(a)(4) in his briefs. To the extent this issue is not waived, Conery did not establish material facts at issue with regard to claim arising under § 411(a)(4).

The District Court also properly granted summary judgment as to the state law claim for malicious prosecution for failure to raise material facts as to a special grievance under New Jersey law. *See Venuto v. Carella, Byrne, Bain, Gilfillan, Cecchi & Stewart, P.C.*, 11 F.3d 385, 392 (3rd Cir.1993). We do not consider plaintiff's argument, raised for the first time on appeal, that the special grievance requirement does not apply to a criminal complaint.

The judgment of the District Court will be AFFIRMED.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Jane A. Restani
Judge

DATED: April 4, 2002

Appendix A

Appeal from the United States District Court
for the District of New Jersey, Newark
(D.C. Civ. Nos. 92-CV-840 & 92-CV-1458)

Before: SCIRICA and COWEN, *Circuit Judges*,
RESTANI*, *Judge*, United States Court of
International Trade

JUDGMENT

This cause came on to be heard from the United States District Court for the District of New Jersey, Newark.

On consideration whereof, it is now hereby ADJUDGED and ORDERED by this court that the order and judgment of the district court entered on March 31, 1998, be and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

DATED: April 4, 2002

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* Honorable Jane A. Restani of the United States Court of International Trade, sitting by designation.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DENYING OBJECTIONS TO THE REPORT AND RECOMMENDATION DATED AND FILED MARCH 31, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 92-840 (JAG)

William J. Conery,

Plaintiff,

v.

John T. Niccollai, Jr., *et al.*,

and

Kenneth Burdge and Frank Fusco,

Plaintiffs,

v.

John T. Niccollai, Jr., *et al.*,

Defendants.

Appendix B

ORDER

This matter comes before the Court by way of Plaintiff Conery's Objections to United States Magistrate Judge G. Donald Haneke's Report and Recommendation issued on January 14, 1998, pursuant to L. Civ. R. 72.1(a) (2) and Fed. R. Civ. P. 72(b), granting summary judgment in favor of the Defendants; and Plaintiff Conery having submitted timely Objections to the Report and Recommendation; and the Defendants having submitted timely Objections to the Report and Recommendation; and the Defendants having submitted a timely response to the Objections; and, pursuant to L. Civ. R. 72.1(C) (2), the Court having conducted a *de novo* review of: (a) Magistrate Judge Haneke's recommended disposition of the dispositive motion; (b) the parties' subsequent submissions; and (c) the underlying record (*See Poveromo-Spring v. Exxon Corp.*, 968 F. Supp 219, 221 n.2 (D.N.J. 1997); *Hines v. Irvington Counseling Center*, 933 F. Supp. 382, 385 (D.N.J. 1996)); and good cause having been shown;

IT IS on this 31st day of March, 1998;

ORDERED that Plaintiff Conery's Objections to the Report and Recommendation are hereby denied; and

IT IS FURTHER ORDERED that the Report and Recommendation of Magistrate Judge Haneke is adopted as the opinion of this Court; and

IT IS FURTHER ORDERED that a copy of this Order be served on all parties within seven (7) days of the date of this Order.

s/ Joseph A. Greenaway, Jr.
JOSEPH A. GREENAWAY, JR., U.S.D.J.

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED JANUARY 14, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.
92-840 (JAG)

[Consolidated]

WILLIAM J. CONERY,

Plaintiff

v.

JOHN NICCOLLAI, JR., *et al.*,

Defendants.

and

KENNETH BURDGE and FRANK FUSCO,

Plaintiffs,

v.

JOHN T. NICCOLLAI, JR., *et al.*,

Defendants.

Appendix C

REPORT AND RECOMMENDATION

Presently before the Court is a motion by the defendants for summary judgment against plaintiff William Conery. This matter has been referred to me by the Honorable Joseph A. Greenaway, Jr. for an appropriate Report and Recommendation pursuant to L. Civ. R. 72.1(a) (2) and Fed. R. Civ. P. 72(b). For the reasons expressed below, I respectfully recommend that the motion for summary judgment be granted.

STATEMENT OF FACTS

These consolidated cases arise out of claims brought by plaintiffs William J. Conery, Kenneth Burdge and Frank Fusco against various officers of Local 464A, United Food and Commercial Workers union ("Local 464A") for allegedly engaging in a continuous and systematic campaign of harassment to prohibit Conery and other union members from exercising their rights under the Labor Management Reporting and Disclosure Act ("LMRDA") and National Labor Relations Act ("NLRA") in order to suppress dissent within Local 464A.

Local 464A is a labor organization and is governed by the terms of its own by-laws and the Constitution of the United Food and Commercial Workers International Union, AFL-CIO ("International Union"). Local 464A's offices are located at 245 Paterson Avenue, Little Falls, New Jersey.

As of December 1996, Local 464A's membership consisted of approximately 18,250 full-time and part-time

active members. Local 464A's members include butchers and meat, deli and fish department employees in large supermarket chains, such as A&P, Shoprite, Pathmark and Kings. Its membership also includes employees working for employers in the meat processing and distribution industry.

At all times relevant to the Conery Complaint, the following defendants held the Local 464A offices/positions:

President	John T. Niccollai, Jr.
Secretary/Treasurer	Ramon Rando
Contract Administrator	Frank Hanley
Recorder	Griff McElroy
Vice President	Walter Biernacki
Business Agent	Frank DiChristina
Business Agent	Donald Ligon
Business Agent	Walter Wriker
Chairman, Exec. Board	George Plesa

Frank B. Fusco, the son of Frank Fusco, served as campaign manager for the 1989 slate of candidates comprised of Kenneth Burdge (candidate for President); Pat Gunnick (candidate for Secretary-Treasurer); John O'Brien (Candidate for Vice President); and Clara Malloy, all of whom ran against the above listed incumbents.

Plaintiff Fusco was appointed Secretary/Treasurer of defendant Local 464A In 1982, following the retirement of Secretary/Treasurer, John Niccollai, Sr. In 1983 and 1986, plaintiff Fusco was re-elected to his position as Secretary/ Treasurer. In 1982, defendant John T. Niccollai, Jr. was appointed to his position as President of defendant Local

464A as a result of the death of former president Anthony Tozzi. Defendant Niccollai was also re-elected President in the 1983 and 1986 elections.

I. Conery's Claims

Conery maintains that various officers of Local 464(a) organized and executed a campaign of harassment against him in response to Conery's dissident activities in Local 464A including Conery's decision to run for president in the union elections in 1989 and 1992. According to Conery, this harassment included (a) the filing of a civil RICO lawsuit in retaliation for Conery's dissident union activities; (b) the filing of an assault charge in Municipal Court to "convince" him to stop participating in union affairs; and (c) the verbal and physical harassment of Conery dating back to April of 1987 in order to suppress dissent within the union.

A brief overview of the factual and legal history giving rise to this case is necessary to assess the merits of the motion.

A. Conery's Union Membership.

Conery is a butcher. In August 1956, Conery joined Local 464A. In October 1961, Conery withdrew from Local 464A. On September 14, 1966, Conery was hired by Bell's Foodtown, an employer having a collective bargaining agreement with Local 464A. On October 14, 1966, Conery was reinstated as an active member of Local 464A.

In April 1987, Conery was elected to be a member of Local 464A's Contract Negotiation Committee. In addition,

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Conery served as a shop steward for a period of time while employed by ShopRite. *See* Appendix to Defendants' Brief in Support of the Motion (hereinafter DaC), page 166.

B. The Contested Elections.

a. The 1989 Election

At the heart of the issues between the parties in this case are the Union elections of 1989 and 1992 which were challenged by plaintiffs. In the 1989 Local 464A election, the following Local 464A members were nominated and ran against the incumbent Local 464A officers for the elected union offices: (1) President – K. Burdge; (2) Secretary/ Treasurer - P. Gunnick: (3) Vice President – J. O'Brien; and (4) Recorder – P. Malloy.

Frank B. Fusco,[1] the son of co-plaintiff, Frank Fusco, served as campaign manager for the 1989 slate of candidates comprised of Burdge, Gunnick, O'Brien and Malloy. DaC 333, In 4-18, DaC 835, DaC 341 in 13 to 19. On the advice of one of his physicians,[2] Conery did not run as a candidate in the 1989 election. Conery did, however, campaign for, encourage and support the slate of candidates headed by Burdge after his release from Carrier Clinic. DaC 171 ¶ 28.

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1. Frank B. Fusco was not a member of Local 464A.

2. Conery was hospitalized for psychiatric treatment at Riverview Medical Center from January 20, 1989 to February 1, 1989 (DaC 1208-1209), and at Carrier Clinic from February 24, 1989 to April 5, 1989 (DaC 1219).

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The 1989 election was held on June 14, 1989. The incumbents, Niccollai, Rando, Biernacki and McElroy were all reelected. By letter dated June 23, 1989, Conery filed a written protest with the Chairman of the Election Committee regarding the 1989 Local 464A election. By letter dated July 11, 1989, the Chairman of the Election Committee denied Conery's protest of the 1989 local 464A election. On July 5, 1989, Conery filed a protest of the 1989 Local 464A election with the International Union. On October 6, 1989, after investigating Conery's complaints, the International union issued a decision denying Conery's protest. DaC 759-768, 787-788, 785, 790-792.

On October 23, 1989, Conery wrote to the United States Department of Labor (IDOL) protesting the 1989 Local 464A election. The DOL conducted a comprehensive investigation of all of the complaints made by Conery. DaC 793-798; DaC 735 and 845. As part of the DOL's investigation with respect to the 1989 Local 464A election, the DOL interviewed Conery, Niccollai, Burdge, Fusco, Gunnick, O'Brien, Louis ROCCO, owner of Rocco Press, Bob Menegold, Election Committee Chairman, James Galvin, co-manager of the A&P Belvedere, John DeDolce, assistant manager A&P Budd Lake, Larry Hansen, co-manager of A&P Blairstown, Ban Thomas, co-manager of ASP Budd Lake, Vincent Fornino, Great Falls Security, Harold Kreiger, Esq., Manny Dasilva, John Alibrando and Bernard Mints, Esq., attorney for the National Labor Relations Board. The report of investigation prepared and approved on November 24, 1989 contained 35 exhibits including the written Reports of interview of the above named individuals. DaC 735 to 845, see list of exhibits DaC 757-758.

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When Burdge was interviewed by the DOL on November 7, 1989, he stated that he had actively campaigned in about twenty-six stores with no problems. Burdge also stated that Conery was not present at the nomination meeting for the 1989 elections and was not nominated for any position. In early 1990, based upon its comprehensive and thorough investigation of all of Conery's allegations, the DOL issued its written Statement of Reasons dismissing Conery's claims regarding the 1989 election. DaC 730 to 734.

b. The 1992 Election

The 1992 Local 464A election was conducted in June of 1992. Conery was nominated and ran for the office of President against the incumbent, Niccollai. Burdge ran for the office of Secretary-Treasurer, against incumbent Rando. Lawrence Scancarella ran for the office of Vice President against the then incumbent Biernacki. DaC 982. The incumbents were once again victorious.[3] Plaintiffs once again challenged the results.

Conery protested the June 9, 1992 election. He wrote to the Election Committee Chairman, addressing twenty-five complaints. After an internal investigation, the Election Committee Chairman found that Conery's complaints lacked merit. DaC 896 to 900. Subsequently, Conery wrote to the International Union. The International Union also conducted an investigation and found that the 1992 Local 464A election was conducted properly. DaC 909 to 915, 921.

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3. The incumbents won the election by a large majority. Niccollai received 2663 votes while Conery received 152. Rando received 2626 while Burdge received 167. Biernacki received 2575 and Scancarella received 201.

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On September 21, 1992, Conery wrote to the DOL protesting the 1992 Local 464A election and alleging the same complaints he addressed in his letter to the Election Committee Chairman and the International Union. His complaints resemble counts one through six in his Complaint before this Court. DOL investigated the charges and dismissed Conery's complaint. DaC 846 to 854.

C. Other Events

On October 21, 1981, Conery and a friend affixed political handbills critical of the incumbent officers of Local 464A to cars parked in Local 464A's parking lot and those parked on the street adjacent to the Union Hall, in Little Falls, New Jersey. Union members whose cars were parked outside complained to Local 464A that Conery had damaged their vehicles. Also, another tenant of the building, Dr. Anthony Boni, complained about Conery's handbilling. DaC 291, DaC 583. He claimed that Conery handbilled the cars of some of his patients. Local 464A called the Little Falls Police. When the police arrived the officer informed Conery that Little Falls had a handbill ordinance prohibiting distribution of handbills on private property. The officer allowed Conery to distribute his handbills on the sidewalk and the officer stood by. Dr. Boni filed a complaint in the Little Falls Municipal Court against Conery for illegal handbilling, but the prosecutor subsequently dropped the charges. DaC 293, DaC 359-363.

Another notable event occurred on August 16, 1990. On that date, Conery and DiChristina got into an argument. After the incident, DiChristina filed a complaint against

Conery in the Passaic Municipal Court for harassment. Conery later filed a cross complaint against DiChristina for harassment. DaC 412-413. On May 22, 1991, a municipal judge heard the trial of these two complaints. Both men were found guilty. DaC 487.

I. Standard of Review of the Local 464A Trial Board's Findings

The initial question to be addressed is the standard of review that the Court must apply to the Local 464A Trial Board's findings. Defendants argue that the trial board's findings should not be disturbed. Defendants rely on *International Brotherhood of Boilermakers v Hardeman*, 401 U.S. 233 (1971), which holds that the courts are not to disturb a trial board's findings where there is some evidence to substantiate the result. The plaintiff argues that the "some evidence" standard is inappropriate here. I agree.

When free speech activities are implicated, the court must review the trial board's findings *de novo*. *Black v. Ryder/ P.I.E. Nationwide Inc.*, 970 F.2d 1461, 1467 (6th Cir. 1992). In our case, Mr. Conery claims, *inter alia*, that the union interfered with his free speech rights by preventing him from distributing campaign leaflets; by attempting to provoke him into fighting to give the Union grounds to expel him; by instituting a RICO action against him; and by generally conspiring to prohibit him from exercising his rights. On the face of Conery's complaint, alleged violations of free speech rights are clearly implicated. Therefore, this Court must conduct a *de novo* review of the trial board's findings.

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II. Legal Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, a court must view the facts in the light most favorable to the nonmoving party. *Bixler v. Central Pa. Teamsters Health & Welfare*, 12 F.3d 1292, 1297 (3d Cir. 1993). The moving party has the burden of establishing that there are no genuine issues of material fact. *See Celotex Corp. v. Catrett*, 477 U.S, 317, 322-24 (1986).

The Supreme Court has stated that, in applying the criteria for granting summary judgment:

> the judge must ask [. . .] not whether [. . .] the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented. The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the (nonmoving) party. The judges inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the [non-movant] is entitled to a verdict [. . . .].

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. *Id.*

In order to resist a motion for summary judgment, a plaintiff must present "more than a mere scintilla of evidence" in his favor. He "cannot simply reallege factually unsupported allegations contained in his pleadings." *Id.* at 249; *see also Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67, 72 (3d Cir. 1990). Only evidence that would be admissible at trial may be used to contest a summary judgment motion. Evidence with a deficient foundation must be excluded from consideration. *Williams v. Borough of West Chester*, 891 F.2d 458, 466 (3d Cir. 1989); *see also Trap Rock Indus., Inc. v. Local 82 , Int'l. Union of Operating Engineers*, 982 F.2d 884, 890-91 (3d Cir. 1992).

III. The Nature of Claims under LMRDA § 101

Seven of the original thirteen causes of action remain in Mr. Conery's complaint.[4] Six of the seven of the causes of action involve claims under § 101(a)(1) and (2) of the LMRDA, 29 U.S.C. § 411(a)(1) and (2). Section 101(a)(1) of the LMRDA was intended to guarantee union members the right to participate in Union campaigns and elections and to attend membership meetings. That section provides:

4. Counts One, Two, Three, Four, Five, Six and Thirteen are currently viable. Counts Seven through Twelve were dismissed prior to the current motion.

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> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums or a labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

§ 101(a)(1) of the LMRDA, 29 U.S.C. § 411(a)(1) . The United States Supreme Court has examined § 101(a)(1) and determined that its provisions are narrow in scope. *Calhoon v. Harvey*, 379 U.S. 134, 138-39 (1964). The *Calhoon* Court explained that § 101(a)(1) is:

> no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote. And Congress carefully prescribed that even this right against discrimination is "subject to reasonable rules and regulations by the union."

Id. A cause of action by a union member cannot be sustained under § 101 without some claim of discrimination and some demonstration that the plaintiff has been denied the right to vote. *Id.*

Section 101(a)(2) was intended to guarantee union members the right to express their views and opinions regarding union elections and officers. That section provides:

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> Every member of any labor organization shall have the rights . . . to express any views, arguments or opinions . . . . Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

§ 101(a)(2) of the LMRDA. 29 U.S.C. § 411(a)(2). Nevertheless, the Supreme Court has explained that a violation of free speech rights by itself is insufficient to violate § 101(a)(2). *Sheet Metal Workers' International Assoc. v. Lynn*, 488 U.S. 347, 353 (1989). The infringement on free speech must be viewed with reference to the basic objective of the LMRDA. *Id.*[5] That objective is "to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open periodic elections." *Finnegan v. Leu*, 456 U.S. 431, 441 (1982). Therefore, the court must not only determine whether the union interfered with Mr. Conery's free speech rights, but also, if the union did interfere, whether that interference affected the democratic governance of the union.

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5. The defendants rely heavily on the interpretations of § 411(a) found in *Calhoon* and *Lynn*. The Court finds this reliance justified as these cases are binding precedents and plaintiff has wholly ignored these precedents in his brief.

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IV. Conery's First Cause of Action

In the first cause of action. Conery claims that the union violated his rights under § 101(a)(1) and (2) by preventing him from distributing campaign leaflets on October 21, 1991. Conery claims that Niccollai ordered other union agents to remove the literature he had placed on the cars in the union parking lot and to order Conery off the property. Nevertheless, Conery's actions on October 21, 1991 were in apparent violation of a local ordinance prohibiting leafletting on private property. Evidence shows that Dr. Anthony Boni, whose patients use the parking lot, telephoned police and later filed charges against Conery for his leafletting activity.

The defendants did not violate Conery's rights under § 101(a)(1) on October 21, 1991. Conery presents no evidence that shows that this incident interfered with the union's election or his right to vote or nominate candidates, *See Calhoon*, 379 U.S. at 138-39. Conery was distributing campaign material in violation of a local ordinance. He presents no evidence showing that the union allowed other members to distribute leaflets on private property. Furthermore, Conery failed to show how this incident affected his right to vote. He apparently participated in the 1992 election by running for president and by supporting other candidates. Therefore, Conery's first cause of action does not state a violation of § 101(a)(1).

Conery's failure to show how the alleged infringement of his free speech rights interfered with his rights to vote and nominate candidates is also fatal to his claim that the union violated his rights under § 101(a)(2). *Lynn*, 488 U.S.

at 353. As Conery ran for president and supported other candidates in the 1992 election, any alleged interference on October 21, 1991 did not interfere with the union's democratic governance. Conery has failed to establish any issues of material fact that could allow a jury to find in his favor. Therefore, I recommend that summary judgment be granted for defendants regarding the First Cause of Action in Conery's complaint.

V. Conery's Second Cause of Action

In his Second Cause of Action, Conery alleges that the union, Niccollai, and other defendants breached the November 3, 1988 settlement agreement between Local 464A and the plaintiff. Defendants allegedly breached the agreement by prohibiting Conery from carrying out his leafletting activities on October 21, 1991.[6]

This cause of action cannot withstand a motion for summary judgment. Any settlement agreement between Conery and the union and the other defendants could not give Conery permission to violate the law. Little Falls Ordinance 6.1-7 prohibits handbilling on private property. Connery's actions on October 21, 1991 were in violation of this ordinance. Furthermore, the union did not prohibit him from all handbilling. Conery distributed his materials on the cars parked on public property, namely the street adjacent to

6. Parenthetically, I do not believe that the leafletting incident occurring on October 21, 1991 constituted a violation of Conery's free speech rights because he was distributing the leaflets in violation of a local ordinance. This determination, however, is not essential to the finding that no § 411(a)(2) violation occurred.

the parking lot. Therefore, I recommend that summary judgment dismissing the Second Cause of Action be granted.

VI. Conery's Third Cause of Action

In Conery's Third Cause of Action, he claims that defendant DiChristina violated his rights by making unsolicited antagonistic remarks to Conery. DiChristina allegedly made these unsolicited remarks to provoke Conery into fighting. Plaintiff does not, however, offer the exact dates these alleged remarks occurred, nor does he offer any witnesses to corroborate the events. Further, Conery fails to allege or demonstrate how these remarks, if they occurred at all, interfered with his right to vote or nominate candidates or how they interfered with the democratic governance of the union. It is well settled that to oppose a summary judgment motion, the nonmoving party cannot merely rest on the pleadings. *Anderson*, 477 U.S. at 249. The facts before the court, even when viewed in a light most favorable to the plaintiff, do not make out a violation of § 101. Therefore, summary judgment should be granted dismissing the Third Cause of Action.

VII. Conery's Fourth Cause of Action

Conery's Fourth Cause of Action claims that Local 464A violated his rights by filing a lawsuit against him alleging RICO violations. According to Conery, the defendants' accusations against him violated his rights under § 101 (a)(1), (2) and (4). The RICO complaint underlying the Fourth Cause of Action was filed more than two years prior to the 1992 election of Local 464A. Conery does not sufficiently show

that the RICO complaint interfered with his rights to vote or nominate candidates or his free speech rights. Conery ran for office in 1992, campaigned and distributed political literature. In fact, Conery himself discussed the RICO complaint against him in the campaign literature he delivered in support of his candidacy for president in 1992. Furthermore, it does not appear from the record before me that the RICO complaint caused a chilling effect on Conery's free speech rights. From the time of the RICO complaint to the 1992 election, Conery distributed literature on numerous occasions, and campaigned in his own, behalf and on the behalf of others. Therefore, I recommend that the defendants' motion for summary judgment against Conery be granted with respect to the Fourth Cause of Action.

VIII. Conery's Fifth Cause of Action

In his fifth cause of action, Conery claims that defendant DiChristina, acting with the approval and support of defendants Niccollai and the union, violated his rights under § 101(a)(1) and (2) by filing a complaint in the City of Passaic. The Passaic complaint alleges that Conery harassed DiChristina by threatening to do him bodily harm and by communicating in a manner likely to cause annoyance; in violation of N.J.S.A. 2C:33-4(A)-(B). Conery cross-claimed that DiChristina harassed him by threatening to do bodily harm in violation of N.J.S.A. 2C:33-4(B). At the trial, the judge found both men not guilty. Now Conery claims that DiChristina's complaint in the City of Passaic violated his rights.

Conery's fifth cause of action is deficient in the same way his previous causes of action were deficient. He has not shown how the defendants' actions interfered with his rights to vote or nominate candidates or how they affected the democratic governance of the union. DiChristina's complaint was filed on August 15, 1990 and Conery's cross-complaint was filed on August 16, 1990. Both the complaint and the cross-complaint resulted in not guilty verdicts on May 22, 1991. Notwithstanding the Passaic complaint, Conery still participated in the 1992 election by running for president and campaigning. Therefore, I recommend that the Court grant summary judgment for the defendants regarding Conery's Fifth Cause of Action.

IX. Conery's Sixth Cause of Action

Conery's Sixth Cause of Action also alleges that the Union violated his rights under § 101 (a)(1) and (2). The union allegedly violated his rights by forcing Frank Fusco to refrain from any political union activity in order to receive his retirement benefits and by requesting the Superior Court of New Jersey to enjoin him from engaging in any union politics including but not limited to distributing campaign literature for, or speaking on behalf of Conery.

On May 26, 1987, Fusco entered a retirement agreement with Local 464A. This agreement was memorialized in letters referred to as "Letter Agreements." The Letter Agreements stipulated that Fusco would refrain from participating in union affairs, and in return, the union would provide him with retirement benefits and severance pay. It appears that Fusco entered into this agreement voluntarily. Subsequently,

the union fulfilled its obligations under the contract by paying Fusco the benefits and severance pay. Thereafter, Fusco breached his agreement with the union and the union filed suit.

Conery now claims that the agreement between Fusco and the union violated his rights under the LMRDA. Here again, however, Conery fails to convince this Court that his rights were indeed violated. Under the LMRDA, Conery has the right to vote and nominate candidates for union election. § 101(a)(1). The LMRDA also prevents unions from interfering with the free speech rights of their members to such an extent that it affects the democratic governance of the union. § 101(a)(2); *Lynn*, 488 U.S. at 353. Fusco entered an agreement with the union exchanging his participation in union elections for retirement benefits and severance pay. Fusco voluntarily agreed not to participate.[7] Fusco's decision not to participate does not constitute a violation of Canary's rights, nor does the union's subsequent action against Fusco

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7. An agreement between a union and a member where the member agrees to forfeit certain rights in exchange for other benefits is perfectly legal. *Parini v. International Brotherhood of Teamsters*, 568 F. Supp. 1246, 1249 (N.D. Ill. 1983) (holding that the Union did not violate the LMRDA by agreeing to give Parini a job in exchange for his not running for office), *aff'd* 749 F.2d 34 (7th Cir. 1984); *see also Finnegan v. Leu*, 456 U.S 431, 440 (1982) (holding that the union's retaliatory discharge of employees who actively supported the president's opponent did not violate the LMRDA because the members had a choice between exercising their right to free expression or keeping their jobs). Similarly, here, Fusco has a choice between entering into the agreement with the union or continuing to exercise his rights. Therefore, the contract between Fusco and the union was permissible.

to enforce the agreement. Conery was still able to participate in elections. Therefore, I recommend that summary judgment dismissing the Sixth Cause of Action be granted.

X. Conery's Thirteenth Cause of Action

Finally, in his Thirteenth Cause of Action, Conery claims that the union violated his LMRDA rights under § 101(a)(1) and (2) by engaging in a continuous, systematic and ongoing scheme to suppress dissent and prevent Conery from exercising his rights. Conery argues that this count must withstand a motion for summary judgment because a union can engage in a purposeful scheme to suppress, even if the particular actions in which they engaged are not independently unlawful. *Schermerhorn v. Local 100, Transport Workers Union*, 91 F.3d 316, 323 (2d Cir. 1996). Nevertheless, plaintiff fails to address the Supreme Court's narrow interpretation of § 101(a)(1) and (2) of the LMRDA, espoused in *Calhoon* and *Lynn*. As stated above in discussion of the other causes of action, Conery has failed to establish that the union interfered with his rights under the LMRDA or that the democratic process of Local 464A suffered due to the union's interference with the rights of its members. Therefore, I recommend that summary judgment dismissing the Thirteenth Cause of Action be granted.

Appendix C

CONCLUSION

For the reasons stated above, I recommend that the defendants' motion for summary judgment be granted in all respects.

Respectfully submitted,

s/ Donald Haneke
Donald Haneke,
United States Magistrate Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 9, 2002

No. 01-2870

WILLIAM J. CONERY; FRANK A. FUSCO; KENNETH BURDGE

v.

JOHN NICCOLLAI, JR., individually and in his official capacity as President of Local 464A, Food and Commercial Workers Union, AFL-CIO; RAMON RANDO, individually and in his official capacity as Secretary-Treasurer of Local 464A; GRIFF McELROY, individually and in his capacity as Recorder of Local 464A; GEORGE PLESA, individually and in his official capacity as Chairman of the Executive Board of Local 464A; FRANK HANLEY, individually and in his official capacity as Contract Administrator; FRANK DICHRISTINA; DONALD LIGON; WILLIAM WRIKER, individually and in their official capacities as Business Agents of Local 464A; UNITED FOOD COMMERCIAL WORKERS UNION, AFL-CIO; SHOPRITE SUPER-MARKETS, INC.; WALTER BIERNACKI, individually and in his official capacity as Vice President of Local 464A; WAYNE WILLIAMS, individually and in his capacity as Director-Pension & Prescription Benefits of Local 464A; JOHN T. NICCOLLAI, SR., individually and in his capacity as Trustee of the Local 464A Pension Fund; Local 464A, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; LOCAL 464A PENSION FUND ADMINISTRATOR AND BOARD OF

Appendix D

TRUSTEES; MARTIN QUINN, in their capacity as administrators and trustees of the Local 464A Pension Fund; GILBERT C. VUOLO, in their capacity as administrators and trustees of the Local 464A Pension Fund; DEWEY CANNELLA, in their capacity as administrators and trustees of the Local 464A Pension Fund; ISADORE ZALKIN, in their capacity as administrators and trustees of the Local 464A Pension Fund,

v.

JOHN NICCOLLAI, JR.; RAMON RANDO; GRIFF McELROY; GEORGE PLESA; FRANK HANLEY; FRANK DICHRISTINA; DONALD LIGON; WILLIAM WRIKER; WAYNE WILLIAMS; JOHN T. NICCOLLAI, SR.; MARTIN QUINN; GILBERT C. VUOLO; DEWEY CANNELLA; ISADORE ZALKIN; WALTER BIERNACKI,

Third Party Plaintiffs,

v.

HAROLD KRIEGER, The Estate of Harold Krieger; STEPHANIE KRIEGER; LOWELL HARDWOOD, as Executors of the Estate of Harold Krieger,

Third Party Defendants.

Appendix D

(D.C. No. 92-cv-00840)

FRANK A. FUSCO; KENNETH BURDGE,

v.

JOHN T. NICCOLLAI, JR., individually and in his capacity as President of local 464A, United Food and Commercial Workers International Union, and as Trustee of the Local 464A Pension Fund; RAMON RANDO, individually and in his capacity as Secretary-Treasurer of Local 464A and as Trustee of the Local 464A Pension Fund; GRIFF McELROY, individually and in his capacity as Recorder of Local 464A; FRANK HANLEY, individually and in his capacity as Contract Administrator of Local 464A; WAYNE WILLIAMS, individually and in his capacity as Director-Pension & Prescription Benefits of Local 464A; JOHN T. NICCOLLAI, SR., individually and in his capacity as Trustee of the Local 464A Pension Fund; LOCAL 464A, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; LOCAL 464A PENSION FUND ADMINISTRATOR AND BOARD OF TRUSTEES; WALTER BIERNACKI, individually and in his capacity as Vice President of Local 464A and as Trustee of the Local 464A Pension Fund; MARTIN QUINN, in their capacity as administrators and trustees of the Local 464A Pension Fund; GILBERT C. VUOLO, in their capacity as administrators and trustees of the Local 464A Pension Fund; DEWEY CANNELLA, in their capacity as administrators and trustees of the Local 464A Pension Fund; ISADORE ZALKIN, in their capacity as administrators and trustees of the Local 464A Pension Fund.

Appendix D

(D.C. No. 92-cv-01458)

William J. Conery,

Appellant

(D.C. Nos. 92-cv-00840 & 92-cv-01458)

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*,
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH,
McKEE, RENDELL, BARRY, AMBRO, FUENTES,
and COWEN*, *Circuit Judges* and RESTANI**, *Judge*,
United States Court of International Trade

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

---

* As to panel rehearing only

** The Honorable Jane A. Restani, Judge, United States Court of International Trade, who sat by designation, as to panel rehearing only.

Appendix D

BY THE COURT,

s/ [illegible]
Circuit Judge

Dated: May 09 2002

APPENDIX E — RELEVANT STATUTE

BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

29 USCS § 411. Bill of rights; constitution and bylaws of labor organizations

(a)(1) Equal rights. Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

* * *

Appendix E

(4) Protection of the right to sue. No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

* * * *

(2)

Supreme Court, U.S.
FILED
AUG 27 2002
OFFICE OF THE CLERK

No. 02-206

In The

Supreme Court of the United States

WILLIAM J. CONERY,

Petitioner,

v.

JOHN NICCOLLAI, JR., individually and in his official capacity as President of Local 464A, Food and Commercial Workers Union, AFL-CIO, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the Third Circuit correctly affirmed the District Court's entry of summary judgment in favor of Respondents dismissing all of Petitioner's claims alleging violations of §101(a)(1) and §101(a)(2) of the Labor Management Reporting and Disclosure Act.

LIST OF PARTIES

Petitioner:

WILLIAM J. CONERY

Respondents:

JOHN NICCOLLAI, JR., individually and in his official capacity as President of Local 464A, Food and Commercial Workers Union, AFL-CIO; Ramon Rando, individually and in his official capacity as Secretary-Treasurer of Local 464A; Griff McElroy, individually and in his official capacity as Recorder of Local 464A; George Plesa, individually and in his official capacity as Chairman of the Executive Board of Local 464A; Frank Hanley, individually and in his official capacity as Contract Administrator; Frank Dichristina, Donald Ligon, William Wriker, individually and in their official capacities as Business Agents of Local 464A; United Food Commercial Workers Union, AFL-CIO; Walter Biernacki, individually and in his official capacity as Vice President of Local 464A; Wayne Williams, individually and in his official capacity as Director – Pension & Prescription Benefits of Local 464A; John T. Niccolai, Sr., individually and in his capacity as Trustee of the Local 464A Pension Fund; Local 464A, United Food and Commercial Workers International Union, AFL-CIO; Local 464A Pension Fund Administrator and Board of Trustees; Martin Quinn, in their capacity as administrators and trustees of the Local 464A Pension Fund; Gilbert C. Vuolo, in their capacity as administrators and trustees of the Local 464A Pension Fund; Dewey Cannella, in their capacity as administrators and trustees of the Local 464A Pension Fund; Isadore Zalkin, in their capacity as

LIST OF PARTIES – Continued

administrator and trustee of the Local 464A Pension Fund

Consolidated Plaintiffs

Frank A. Fusco; Kenneth Burdge

Defendant in District Court

Shoprite Supermarkets, Inc.

Third Party Defendants in the District Court

Harold Krieger, The Estate of Harold Krieger, Stephanie Krieger, Lowell Harwood, as Executors of the Estate of Harold Krieger

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the Respondents disclose that they are individuals and a labor union and as such have no publicly held companies that hold 10% or more of their stock.

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COUNTERSTATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over the matters presented to this Court for review under 28 U.S.C. §1331 and 29 U.S.C. §412. This Court has jurisdiction with respect to the Petition for Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

COUNTERSTATEMENT OF THE CASE

Nature of the Case

Petitioner, William J. Conery ("Conery"), seeks review of the dismissal of his claims alleging violations of §§101(a)(1) and (2) of the Labor Management Reporting and Disclosure Act ("LMRDA").

Proceedings Below and Disposition

Conery filed the underlying complaint, *Conery v. John Niccollai, Jr., et al,* Civil Action No. 92-840 ("Conery §101 Complaint"), on February 24, 1992. The Conery §101 Complaint was consolidated with an action commenced by Frank A. Fusco ("Fusco") and Kenneth Burdge ("Burdge") entitled *Frank A. Fusco and Kenneth Burdge v. John T. Niccollai, Jr., et al.,* Civil Action No. 92-1458 (the "Fusco/Burdge §101 Complaint"). By order dated October 16, 1992, the Conery §101 Complaint and the Fusco/Burdge §101 Complaint were consolidated with an action entitled *Kenneth Burdge and Frank A. Fusco v. John T. Niccollai, Jr., et al.,* Civil Action No. 92-1929 (the "Fusco/Burdge §501 Complaint").

On February 2, 1993, a Stipulation of Dismissal was filed dismissing all claims asserted by Conery against defendant ShopRite Supermarkets (the Eighth and Tenth Causes of Action in the Conery §101 Complaint). On August 2, 1994, a Stipulation and Order was entered

dismissing Conery's claims against the Respondents[1] in the Seventh and Ninth Causes of Action in the Conery §101 Complaint.[2] On September 27, 1994, partial summary judgment was entered in favor of Respondents dismissing the Eleventh and Twelfth Causes of Action in the Conery §101 Complaint.[3]

On December 14, 1995, an order was entered allowing Conery to file a First Amended Complaint which added a thirteenth cause of action. Conery's amended complaint was filed on January 16, 1996 at which point the Conery §101 Complaint consisted of the First, Second, Third, Fourth, Fifth, Sixth and Thirteenth Causes of Action.

In February 1996, the respondents filed motions for summary judgment seeking dismissal of:

- the remaining claims in the Conery §101 Complaint;
- the Fusco/Burdge §101 Complaint;[4] and
- the Fusco/Burdge §501 Complaint.

The District Court Judge referred all of the summary judgment motions to the Magistrate Judge for Report and Recommendation ("Report").

---

[1] References to "Respondents" mean all defendants in the Conery §101 Complaint except ShopRite Supermarkets, Inc.

[2] Conery's Seventh, Eighth, Ninth and Tenth Causes of Action which were voluntarily dismissed at the District Court level, were not appealed to the Third Circuit and are thus not the subject of this Petition.

[3] The District Court's dismissal of Conery's Eleventh and Twelfth Causes of Action was appealed to the Third Circuit. The dismissal of those causes of action was affirmed by the Third Circuit. Petitioner does not seek review of the Third Circuit's action with respect to those causes of action.

[4] Local 464A also moved for partial summary judgment of liability against Fusco on its counterclaim in the Fusco/Burdge §101 Complaint. Fusco moved for summary judgment seeking dismissal of Local 464A's counterclaim. Local 464A's motion was granted; Fusco's motion was denied.

On January 14, 1998, the Magistrate Judge issued his Report (Pet. App. at 12a) with regard to the Conery claims in which he recommended the entry of summary judgment dismissing all remaining claims in the Conery §101 Complaint.[5] An objection to the Report was filed by Conery. The Respondents filed a response to Conery's objection.

The District Court Judge conducted a *de novo* review of the record, and by order dated March 31, 1998, adopted the Magistrate Judge's Report and entered summary judgment in favor of the Respondents, dismissing all remaining claims in the Conery §101 Complaint. (Pet. App. at 10a).

On July 12, 2001, Conery filed a Notice of Appeal in the Third Circuit limited to the orders granting summary judgment in favor of the respondents dismissing the First, Fourth, Fifth, Eleventh, Twelfth and Thirteenth Causes of Action in the Conery §101 Complaint.

On September 27, 2001, the District Court Judge entered a Rule 58 Judgment to resolve a jurisdictional issue raised by the Third Circuit *sua sponte*. (Resp. App. at 1-2).

On April 4, 2002, the Third Circuit entered a judgment intended to affirm the dismissal of the First, Fourth, Fifth, Eleventh, Twelfth and Thirteenth Causes of Action (Pet. App. at 9a) but which inadvertently referenced the summary judgment order dated March 31, 1998 instead of the Rule 58 Judgment. On April 18, 2002, Conery filed a Petition for Rehearing and for Rehearing En Banc. On May 9, 2002, the Third Circuit entered an order denying Conery's rehearing petition.

On May 28, 2002, the Third Circuit entered an amended judgment, substituting a reference to the Rule 58

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[5] The Magistrate Judge also issued a Report recommending dismissal of the Fusco/Burdge §101 Complaint and the Fusco/Burdge §501 Complaint. The District Court adopted the Magistrate's recommendation and entered summary judgment dismissing both the Fusco/Burdge §101 Complaint and the Fusco/Burdge §501 Complaint.

Judgment in place of the reference to the March 31, 1998 summary judgment order contained in the April 4, 2002 Judgment. (Resp. App. at App. 3-7).

Facts Material to the Conery §101 Complaint

A. Local 464A and Its Officers

United Food and Commercial Workers International Union, Local 464A ("Local 464A" or "Union") is a labor organization with offices located in Little Falls, New Jersey.

At times relevant to the Conery §101 Complaint, Local 464A's membership consisted of approximately 18,250 full-time and part-time active members. Local 464A's members include butchers, as well as meat, deli and fish department employees in supermarket chains, such as A&P, ShopRite, Pathmark and Kings. Its membership also includes employees working for employers in the meat processing and distribution industry.

At all times relevant to the Conery §101 Complaint, the following Respondents held the Local 464A offices/positions indicated:

President	-	John T. Niccollai, Jr. ("Niccollai")
Secretary/Treasurer	-	Ramon Rando ("Rando")
Recorder		Griff McElroy ("McElroy")
Vice President	-	Walter Biernacki ("Biernacki")
Business Agent	-	Frank DiChristina ("DiChristina")

B. Conery's Union Membership

Conery is a butcher. He joined Local 464A in 1956. In October 1961, Conery took a withdrawal card from Local 464A. In September 1966, Conery was reinstated as an active member of Local 464A.

C. Conery's Work and Disciplinary History with ShopRite

1973 In February 1973, Conery was hired by ShopRite. Conery received employee warning notices for, *inter alia,* poor work performance and poor attitude on November 12, November 20, and December 20, 1973.

1974 On November 9, 1974, Conery received an employee warning notice for poor work performance and poor attitude. On November 11, 1974, Conery's employment with ShopRite was terminated. On November 19, 1974, Local 464A grieved Conery's termination. On December 5, 1974, Conery wrote to Local 464A thanking Local 464A for its actions on his behalf. Due to the efforts of Local 464A, Conery's discharge/termination was, by arbitration award, converted to a suspension.

1975 Conery received employee warning notices for poor work performance, poor attitude and insubordination on February 11 and April 11, 1975.

1977 On April 18, 1977, Conery received an employee warning notice for insubordination and other work infractions.

1980 Conery received employee warning notices for poor work performance, poor attitude and other work infractions on January 28, March 19, and October 6, 1980. On December 14, 1980, Conery received a one (1) day suspension. On January 20, 1981, Local 464A grieved Conery's suspension and settled the matter with his employer, ShopRite.

1981 On October 13, 1981, Conery was demoted. Local 464A grieved Conery's demotion. On November 9, 1981, Conery wrote to Local 464A again thanking Local 464A for its actions on his behalf. Due to Local 464A's efforts, Conery's demotion was, by arbitration award, set aside and Conery was awarded back pay.

1982 to 1996 Conery's disciplinary problems with ShopRite continued from 1982 to the date of the filing of the summary judgment motions, resulting in dozens of disciplinary actions by ShopRite against Conery, as well as

charges filed by Conery against ShopRite with the NLRB and claims asserted against ShopRite by Conery in the Conery §101 Complaint.

D. Conery's Participation in the Democratic Process of the Union

1. Conery's Union Positions

In April 1987, Conery was elected to Local 464A's Contract Negotiation Committee. Additionally, Conery served as a shop steward for a period of time while employed by ShopRite.

2. Conery's Political Literature

Conery expressed his views, arguments and opinions regarding the incumbent Local 464A officers and their management of the Union by, among other things, preparing and distributing to Local 464A members the following political literature:

Date	Title/Description
December 2, 1982	"Crisis in Confidence"
December 1982	Newspaper headlines and magazine excerpts
April 3, 1983	Untitled
April 29, 1987	Untitled
August 31, 1987	"Why Our Union Isn't Working For Us"
1987	"Union Renewal, We the People In Order To Form A More Perfect Union"
1987 and 1988	"Freedom"
Circa 1989 Election	"Enough is Enough"
Circa 1989 Election	"We Are Being Ripped Off By the Union Leadership"
Circa 1992 Election	"Support a Free and Democratic Union Join the Membership Solidarity"
Undated	"Members For Union Democracy – Bill Conery"
September 1994	"Put an End to Union Nepotism and join the N.U.T. Bill Conery"
Undated	"How Did They Do That" by Bill Conery

Undated	"Union Officials Have Sold Out, Betrayed the Membership, and Killed Your Job Security"
Undated	"Members For Union Democracy"
Undated	"Part-time Employees Are Being Ripped Off by This Union"
Undated	Conery literature copied onto NLRB official notice letterhead with NLRB seal
1992	"Union Renewal"
Undated	Modified version of 1987/1988 "Freedom"

3. Conery's Participation in Union Elections

(a) The 1989 Contested Union Election

In the 1989 Local 464A election, the following Local 464A members were nominated for the offices indicated and ran against the incumbents:

President	Sec.-Treas.	Vice President	Recorder
K. Burdge ("Burdge")	P. Gunnick ("Gunnick")	J. O'Brien ("O'Brien")	C. Malloy ("Malloy")

On the advice of one of his physicians, Conery did not run as a candidate in the 1989 election.[6] However, Conery, after his release from Carrier Clinic, campaigned, encouraged and supported the slate of candidates headed by Burdge.

The 1989 election was held on June 14, 1989. The incumbents were all re-elected. The tally was as follows:

President	V. P.	Sec.-Treas.	Recorder
Niccolla	Biernacki	Rando	McElroy
4421	4250	4266	4320
Burdge	O'Brien	Gunnick	Malloy
412	513	488	514

[6] Conery was hospitalized for psychiatric treatment at Riverview Medical Center from January 20, 1989 to February 1, 1989 and at Carrier Clinic from February 24, 1989 to April 5, 1989.

On June 23, 1989, Conery filed a written protest with the Chairman of the Election Committee regarding the 1989 election. By letter dated July 11, 1989, the Chairman denied Conery's protest. On July 5, 1989, Conery filed a protest of the 1989 election with the United Food and Commercial Workers International Union, AFL-CIO (the "International Union"). On October 6, 1989, after investigating Conery's complaints, the International Union denied Conery's protest.

On October 23, 1989, Conery wrote to the United States Department of Labor ("DOL") protesting the 1989 election. The DOL conducted a comprehensive investigation of all of Conery's complaints. As part of the DOL's investigation into the 1989 election, the DOL interviewed Conery; Niccollai; Burdge; Fusco; Gunnick; O'Brien; Louis Rocco; Bob Manigold, Election Committee Chairman; James Galvin; John DeDolce; Larry Hansen; Dan Thoma; Vincent Fomino; Harold Krieger, Esq., Manny DaSilva, John Alibrando and Bernard Mintz, Esq., attorney for the National Labor Relations Board, Region 22. The report of investigation contained thirty-five (35) Exhibits.

When Conery's co-plaintiff, Burdge, was interviewed by the DOL on November 7, 1989, he stated that he had actively campaigned in about twenty-six (26) stores with no problems.

In early 1990, based upon its comprehensive and thorough investigation of all of Conery's allegations, the DOL issued its written "Statement of Reasons" dismissing Conery's claims regarding the 1989 election.

(b) The 1992 Contested Union Election

The 1992 Local 464A election was conducted in June. Conery was nominated and ran for the office of President against the incumbent, Niccollai. Burdge and Lawrence Scancarella also ran against the incumbents.

The 1992 election results were as follows:

President		Secretary-Treasurer		Vice President	
Niccollai	2663	Rando	2626	Biernacki	2575
Conery	152	Burdge	167	Scancarella	201

On June 19, 1992, Conery protested the 1992 election in a letter to Robert Allen Page ("Page"), Election Committee Chairman. Conery's letter set forth twenty-five (25) separate complaints and enclosed a copy of the internal Union charges which Conery had filed on November 19, 1991 against the incumbents, Local 464A's Executive Board and others.

By letter dated June 23, 1992, Page responded to each and every one of Conery's twenty-five (25) complaints and advised Conery that his protest was denied.

On July 10, 1992, Conery protested the election to William Wynn ("Wynn"), the President of the International Union. By letter dated July 21, 1992, Wynn advised Conery that his appeal was out of time, but that he was nonetheless directing that Conery's allegations regarding the 1992 election be investigated and that a written decision would be rendered.

On July 27, 1992, Conery wrote to the International Union Executive Board appealing Wynn's determination that Conery's appeal to Wynn was out of time. Conery also wrote to Wynn requesting that he reconsider his earlier decision.

On August 3, 1992, Wynn wrote to Conery and advised him that his July 21, 1992 decision denying Conery's appeal as being out of time would stand, but reiterated that the International Union would conduct an investigation of his complaints and render a written opinion.

On September 8, 1992, the International Union issued a written opinion based upon its extensive investigation of Conery's complaints. The seven (7) page opinion addressed each and every one of Conery's allegations, concluded that there was no merit to any of Conery's claims and that the 1992 election was conducted properly.

On September 14, 1992, Conery wrote to the International Union Executive Board appealing the decisions contained in the July 21, August 3, and September 8, 1992 letters.

On September 17, 1992, the International Union wrote to Conery and advised him that the International

Executive Board had affirmed the decisions contained in the July 21 and August 3, 1992 letters. In addition, the September 17 letter advised Conery that the International Executive Board concurred with the findings contained in the International President's September 8 letter.

On September 21, 1992, Conery wrote to the DOL protesting the 1992 election and setting forth the same allegations as he had in his appeal to the Election Committee Chairman and the International Union. The allegations in the September 21 letter from Conery to the DOL are substantially the same allegations made by Conery in the Conery §101 Complaint.

As a result of Conery's September 21 letter, an investigation was commenced by the DOL. The investigation was conducted over a two (2) month period from September to November 1992. Twenty-seven (27) individuals were interviewed in the course of this investigation including Conery; Niccollai; Page; Bernard Mintz, attorney for the National Labor Relations Board, Region 22; Harold Krieger, Esq.; Frank DiChristina ("DiChristina"); Dr. Anthony Boni; a co-employee of Conery, referred to as "John Doe"; Robert Tracey; Frank Hanley ("Hanley"); Rando; Donald Ligon ("Ligon"); Walter Wriker ("Wriker"); Michael Koval ("Koval"); ShopRite officials, including David L. Williams, Vice President Human Resources, James Morrison, District Manager-Central Region and Robert J. Simmons, attorney for ShopRite Supermarkets, Inc.; Robin Johnson; William Clarke, Labor Relations Director, A&P; Frank Fusco; Lawrence Scancarella, candidate for Vice President in 1992 election; Andy Blanos, shop steward Netcong ShopRite; John Kovaleski, Vice President Human Resources, Mayfair Foodtown; Bill Vuolo, Vice President Labor Relations Grand Union; Francis Stinner, Passaic ShopRite steward; Frank Juba, Passaic ShopRite store manager; Jose Rosano, disqualified candidate for Recorder in the Local 464A 1992 elections; and Sal Scancarella.

At the conclusion of the DOL's investigation, the DOL issued a twenty (20) page report of investigation including

sixty-seven (67) exhibits and the Reports of Interview of each of the twenty-seven (27) interviewees. Each and every allegation set forth by Conery in his September 21, 1992 letter to the DOL was thoroughly and comprehensively investigated and reported on. Under letter dated August 12, 1993, the DOL forwarded to Local 464A its eight (8) page "Statement of Reasons" for dismissing Conery's complaint regarding the 1992 election. The Statement of Reasons made full findings with respect to each of Conery's complaints, again, many of which are the same complaints Conery raised in the Conery §101 Complaint.

(c) The 1995 Uncontested Union Election

The 1995 Local 464A election was uncontested. The incumbents were re-elected.

On May 8, 1995, Conery filed an objection to the Local 464A 1995 uncontested election claiming, *inter alia,* that his prosecution of the Conery §101 Complaint hindered his ability to participate in the election.

E. Conery's Legal Actions Against Local 464A and Others

1. Conery's Unfair Labor Practice ("ULP") Charges

Date	Charging Party	Respondent	Subject Matter of ULP Charge/Disposition
3/22/88	Conery	Local 464A	Feb. 1988 disciplinary charges by Union against Conery
11/3/88	Conery		Conery and Local 464A execute Settlement Agreement relating to 3/22/88 ULP charge
7/5/89	Conery	ShopRite and other supermarkets	Illegal restrictions regarding 1989 election

11/20/89	Conery	ShopRite	Warning notice and transfer
11/20/89	Conery	ShopRite and other supermarkets	Illegal restrictions regarding 1989 election
12/12/89	Conery	ShopRite	Warning notice, overtime, illegal practices
12/12/89	Conery	Local 464A	Failure to represent Conery on grievances against ShopRite
1/26/90	Conery		Conery withdraws 12/12/89 ULP charges against ShopRite and Local 464A
1/29/90	Conery	ShopRite	Same as 12/12/89 ULP charges and preventing distribution of campaign literature
1/29/90	Conery	Local 464A	Same as 12/12/89 ULP charges and preventing distribution of campaign literature
3/1/90	Conery	ShopRite	Amendment to 1/29/90 ULP charge
3/20/90	Conery	Local 464A	Local 464A's Complaint in U.S. District Court against Conery
8/28/90	Conery	Local 464A	Restraint on Union activities
9/17/90	Conery	Local 464A	Amending 8/28/90 ULP charge to include DiChristina's Municipal Court Complaint
11/28/90	Conery	Local 464A	2nd Amendment to 8/28/90 ULP charge
11/21/91	Conery	Local 464A	Dr. Boni's Municipal Court Complaint

On March 9, 1992, Judge Howard Edelman, A.L.J., approved and executed a Settlement Stipulation between Local 464A and Conery settling the charges filed by Conery on March 20, August 28, September 17 and November 28,

1990. On June 2, 1992, the NLRB approved the Settlement Stipulation and noted in its Decision and Order that Conery failed to execute the Settlement Stipulation.

Conery subsequently filed and withdrew additional charges as follows:

Date	Charging Party	Respondent	Subject Matter of ULP Charge/Disposition
8/17/92	Conery	ShopRite	Conery's suspension by ShopRite
8/17/92	Conery	Local 464A	Restraint in exercising Union rights
8/25/92	Conery	Local 464A	Interference w/Union rights
9/2/92	Conery	Garden State Sausage Co., Inc.	Interference with administration of Local 464A
9/2/92	Conery	Local 464A	Restraining members' rights
12/30/92			Conery withdraws all of the above listed ULP charges

2. Conery's Internal Union Charges

On November 19, 1991, Conery filed internal Union charges against the Local 464A Executive Board, Niccollai, Rando, Hanley, DiChristina, Wriker, Ligon, Koval and Ralph "X", charging those individuals with violating Conery's rights during the period from 1987 through 1991. On February 6, 1992, the Local 464A Trial Board conducted a plenary hearing on Conery's internal Union charges. Following the hearing and deliberation, the Trial Board concluded that Conery had failed to prove the charges and found all individuals who were charged by Conery innocent.

3. Conery's Complaints to Governmental Agencies

At various times during the period 1987 to 1989, Conery lodged complaints with the following agencies, claiming that Local 464A had violated his rights as a union member:

- The United States Department of Justice;
- The Federal Bureau of Investigation;
- The United States Attorney's Office for the District of New Jersey;
- The New Jersey Attorney General's Office

None of these agencies took any action against Local 464A as a result of the complaints made by Conery.

In a letter to the DOL dated June 30, 1988, Conery accused Niccollai, Rando, McElroy, Hanley and Business Agents, Harry Conforti ("Conforti") and Koval, of engaging in violent action against Conery. By letter dated August 22, 1988 to the DOL, Conery requested the United States Secretary of Labor remove Niccollai, Rando, McElroy, Hanley, Business Agents Conforti and Koval, as well as the entire Local 464A Executive Board from their respective positions with Local 464A. The DOL took no action against any of the individuals referred to in Conery's letters of June 30 and August 22, 1998.

F. Incidents Which Conery Claims Violate His Protected Rights

1. The Passaic Municipal Court Action

DiChristina was the Local 464A business agent assigned to the ShopRite store where Conery worked. On August 16, 1990, DiChristina filed a complaint in the Passaic Municipal Court against Conery arising out of an argument occurring at Conery's place of employment on August 15, 1990. On or about September 1, 1990, Conery filed a cross-complaint in the Passaic Municipal Court against DiChristina. Conery admitted that he filed the cross-complaint solely because DiChristina filed a complaint against him.

On May 22, 1991, the matters were tried in the Passaic Municipal Court. After hearing testimony from both parties, the Municipal Court Judge ruled that DiChristina was not guilty with respect to the charge filed by Conery and that Conery was not guilty with respect to the

charges filed by DiChristina. The Municipal Court Judge imposed sanctions against Conery in the amount of $400 for his failure to appear at a previously scheduled trial date.

2. Conery's Handbilling on October 21, 1991

On October 21, 1991, Conery and a friend of his affixed political handbills critical of Local 464A's incumbent officers to cars parked in Local 464A's parking lot as well as cars parked on the street adjacent to the Union hall. The handbills were put in door handles, under windshield wipers, on radio antennae and, as stated by Conery: "wherever I thought it was applicable at the time. Wherever it was easiest to put." Local 464A members attending a shop steward seminar at the Union hall on that date complained to Local 464A officers that Conery had damaged their vehicles (*e.g.*, broken windshield wipers) when placing his handbills on them, and requested that Conery not further touch their automobiles.

Dr. Anthony Boni, a dentist and a tenant in the Local 464A building, also complained to Local 464A about Conery's handbilling on October 21, 1991. Dr. Boni's concern was triggered by separate complaints by two of his patients within a 10 to 15 minute period on that date, complaining about Conery's flyers which they found on their cars.

As a result of the complaints by Local 464A members and Dr. Boni, Local 464A called the Little Falls Police. The Little Falls police responded and advised Conery that there was a handbill ordinance in Little Falls prohibiting distribution of the handbills. Niccollai advised the police officer that he was not concerned with Conery's distribution of his written material so long as he did not damage

the property of others. Thereafter, the officer allowed Conery to distribute his handbills on the sidewalk.[7]

After consulting with his attorney, Dr. Boni filed a complaint in the Little Falls Municipal Court charging Conery with a violation of Local Ordinance 6.1-7 (Handbills). Boni's Complaint was dismissed by the Municipal Court Judge at the request of the municipal prosecutor. The Municipal Court Judge stated at that time:

> Okay, Mr. Conery, I'm sure you're well aware now you cannot do what you did. If you do it in the future, I will not permit a withdrawal of the complaint or a dismissal of the complaint do you understand that? And, I'll insist that the complaint be prosecuted.

3. DiChristina Remarks

Conery claims that DiChristina made certain provocative remarks to him in late 1991 in an attempt to create grounds for disciplining Conery in violation of his LMRDA rights. Although Conery claims that DiChristina called him "asshole", "jerk", "erratic", "ungentlemanly", and "a bullshitter", Conery admitted that the name calling was two-sided, that there were no witnesses to the alleged verbal harassment and that he did not remember when the remarks were made.

4. Local 464A's Complaint in the District Court

On March 5, 1990, Local 464A filed a civil action against Conery in the United States District Court for the District of New Jersey ("Local 464A Complaint"). At various times in the late summer and fall of 1990, Conery

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[7] From the testimony by Conery and others, it appears by this time Conery had already placed his campaign literature on every car in the parking the lot and along the street.

requested Niccollai to dismiss the Local 464A Complaint. As a result of those requests, on December 18, 1990, Local 464A filed a motion to voluntarily dismiss the Local 464A Complaint.

Notwithstanding the fact that Conery was represented by counsel, on December 31, 1990, Conery filed a *pro se* objection to Local 464A's motion for voluntary dismissal and sought leave to file a counterclaim. On January 14, 1991, Local 464A filed a response to Conery's *pro se* filing. On January 22, 1991, Conery filed additional papers in opposition to Local 464A's motion for voluntary dismissal.

On February 1, 1991, the attorneys representing Conery with respect to the Local 464A Complaint filed a motion for leave to withdraw as counsel for Conery.

On February 8, 1991, Conery submitted a handwritten letter to the District Court Judge in connection with his request to file a counterclaim.

On February 25, 1991, the District Court entered an Order granting Local 464A's motion to voluntarily dismiss the Local 464A Complaint and simultaneously granted the motion by Conery's attorneys to withdraw as counsel for Conery. On March 27, 1991, the District Court entered an order denying Conery's application for leave to file a counterclaim.

ARGUMENT

I. THE THIRD CIRCUIT PROPERLY APPLIED THE SUPREME COURT'S RULINGS IN *CALHOON* AND *LYNN* IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S CLAIMS UNDER LMRDA §101(a)(1) AND §101(a)(2)

In affirming the dismissal of Petitioner's LMRDA §101(a)(1) and (2) claims, the Third Circuit relied upon the holdings of *Calhoon v. Harvey*, 379 U.S. 134, 13 L.Ed. 2d 190, 85 S. Ct. 292 (1964), *reh. den.*, 379 U.S. 984, 13 L.Ed. 2d 577, 85 S. Ct. 639 (1965), and *Sheet Metal Workers v. Lynn*, 488 U.S. 347, 102 L.Ed. 2d 700, 109 S. Ct. 639

(1989). The Third Circuit also determined that the Report, which was adopted by the District Court Judge, correctly set forth the factual background relating to Petitioner's claims. (Pet. App. at 5a, n.1). Applying the holdings of *Calhoon* and *Lynn* to the facts, the Third Circuit appropriately concluded:

> Conery participated fully in union elections and spoke his mind. He ran for office and supported other candidates. None of the actions of the Local 464A officials interfered with Conery's rights to vote for and nominate candidates, nor did he present evidence establishing interference with the democratic governing of the union. (Pet. App. at 8a).

A. The Third Circuit Correctly Affirmed the Dismissal of Petitioner's Claims Alleging Violations of §101(a)(1)

LMRDA §101(a)(1), codified at 29 U.S.C. §411(a)(1), provides, in pertinent part:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of a labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

The scope and application of this section of the LMRDA was analyzed by this Court in *Calhoon*. In *Calhoon*, Justice Black delivered the opinion of the Court, stating:

> All that §101(a)(1) guarantees is that "every member of a labor organization shall have equal rights and privileges . . . to nominate candidates, to vote in elections or referendums of the labor organization . . . and to participate in the deliberations and voting . . . subject to reasonable

> rules and regulations in such organization's constitution and bylaws."
>
> Plainly, this is no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote. And Congress carefully prescribed that even this right against discrimination is "subject to reasonable rules and regulations" by the union.

Id., 379 U.S. at 138-39, 13 L.Ed. 2d 193-194.

In affirming the dismissal of the *Calhoun* plaintiffs' complaint, this Court found that:

> The complaining union members here have not been discriminated against in any way and had been denied no privilege or right to vote or nominate which the union has granted to others. They have indeed taken full advantage of the uniform rule limiting nominations by nominating themselves for office.

Id., 379 U.S. at 139.

Here, Petitioner has never alleged, much less produced a scintilla of evidence, that he has been discriminated against in his ability to nominate or vote. To the contrary, Petitioner has, to an extent even greater than the plaintiffs in *Calhoon*, fully participated in Local 464A's political processes by, *inter alia:*

- being nominated and elected to Local 464A's contract negotiating committee in April 1987;
- campaigning for and supporting candidates in the 1989 and 1992 elections;
- participating in the 1989 and 1992 elections;
- contesting the 1989 and 1992 elections with the Local, the International Union and the DOL;
- proclaiming his own candidacy and seeking the nomination for the office of president in 1992;
- being nominated for the office of president in 1992;

- campaigning for the office of president in 1992;
- contesting the 1995 election with the DOL;
- distributing literature in support of his campaign, and the campaign of others and in opposition to the incumbent officers during the period 1987 through 1992; and
- organizing opposition to the incumbent officers and their platform during the period 1989 through 1992.

The Third Circuit properly ruled that Petitioner failed to allege or demonstrate the discrimination necessary to maintain a cause of action under §101(a)(1), as required by *Calhoon*. It correctly applied the controlling law and affirmed the dismissal of Petitioner's §101(a)(1) claims. Since the Third Circuit's interpretation and application of §101(a)(1) is entirely consistent with this Court's binding precedent, this Court should deny the Petition for Writ of Certiorari.

B. The Third Circuit Correctly Affirmed the Dismissal of Petitioner's Claims Alleging Violations of §101(a)(2)

LMRDA §101(a)(2), codified at 29 U.S.C. §411(a)(2), provides, in pertinent part:

> Every member of any labor organization shall have the right . . . to express any views, arguments or opinions. . . . Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

This Court has analyzed the scope and application of §101(a)(2) and has established a two-prong test to determine whether a §101(a)(2) violation has occurred. *Lynn*, 488 U.S. at 354; *Finnegan v. Leu*, 456 U.S. 431, 440 (1982). The first prong requires a determination be made that the

challenged action interfered with the exercise of the union member's rights. *See Lynn*, 488 U.S. at 354. The second prong of the analysis, which is applied only if there is a finding of interference with the union member's rights, was set forth as follows:

> This is not, of course, the end of the analysis. Whether such interference with Title I rights give rise to a cause of action under §102 must be judged by reference to the LMRDA's basic objective: "to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections".

Id., 488 U.S. at 354 (citation omitted) (bracket in original).

This Court's two-prong §101(a)(2) analysis is unquestionably applicable to Petitioner's claims. It is an analysis which the Ninth Circuit Court of Appeal applied in *Teamsters Joint Council No. 42 v. IBT, AFL-CIO*, 82 F.3d 303 (9th Cir. 1996). There, the court stated:

> The Supreme Court has established a two part test for analyzing the speech protections of §101(a)(2). See *Sheet Metal Workers' v. Lynn*, ... We first determine "whether petitioners' 'rights secured' under Title I were 'infringed'" by the alleged action. . . .
>
> Even if the partitioning infringed rights protected by Title I of the LMRDA, "[t]his is not of course the end of the analysis." . . . Step two of the analysis requires that the alleged interference "be judged by reference to the LMRDA's basic objective: 'to ensure that unions [are] democratically governed and responsive to the will of the union membership[].'"

Teamsters Joint Council No. 42, 82 F.3d at 305-306 (citation omitted). Petitioner's claim that the Third Circuit misinterpreted *Lynn* (P10) is totally without merit.

The record in this case unquestionably demonstrates that Petitioner does not meet either prong of the two-prong test articulated by this Court in *Lynn* and *Finnegan*.

There was no interference with Petitioner's §101(a)(2) membership rights, and even if Petitioner's rights were infringed (which they were not), the record does not in any way support a claim that there was any interference with the democratic governance of the Union.

Since the Third Circuit's interpretation and application of §101(a)(2) is entirely consistent with this Court's binding precedent, this Court should deny the Petition for Writ of Certiorari.

II. THERE IS NO CONFLICT BETWEEN THE THIRD CIRCUIT'S RULING IN THIS CASE AND DECISIONS IN OTHER CIRCUITS INTERPRETING LMRDA §101(a)(1) AND §101(a)(2)

A. Petitioner's §101(a)(1) Argument is Meritless

In an effort to convince this Court that the Third Circuit's decision in this case is in conflict with the decisions of other Circuit Courts of Appeal with respect to the interpretation of §101(a)(1), Petitioner argues that generic pronouncements by Circuit Courts of Appeal regarding the purposes of the LMRDA and the need to liberally construe remedial legislation establish the conflict of which he complains. As additional support for his "conflict in the Circuit Courts" theory, Petitioner offers the untenable argument that *Calhoon* did not interpret §101(a)(1).

A review of the cases cited by Petitioner (P5-6) reveals that, other than *Smith v. United Mine Workers*, 493 F.2d 1241 (10th Cir. 1974), none of the cases address the interpretation or application of §101(a)(1). *Burroughs v. Operating Engineers Local Union No. 3*, 686 F.2d 723 (9th Cir. 1982) (P5), involved a claim under §101(a)(3). *Schuchardt v. Millwrights & Machinery Erectors Local No. 2834*, 380 F.2d 795 (10th Cir. 1967) (P5-6), made only generic reference to the basic purpose of Subchapter II – Bill of Rights of Members of Labor Organizations. *Hall v. Cole*, 412 U.S. 1, 93 S. Ct. 1943 (1973) (P5), focused on the District Court's authority to award attorney's fees to a successful plaintiff in an LMRDA case. *International*

Brotherhood of Boilermakers, et al. v. Braswell, 388 F.2d 193 (5th Cir.), *cert. den.* 391 U.S. 935 (1968) (P6), was concerned with a §101(a)(5) issue and is apparently cited by Petitioner for the general statement that remedial legislation should be liberally construed. And, finally, *Marshall v. Local 1010*, 498 F. Supp. 368 (N.D. Ind. 1980), *aff'd* 664 F.2d 144 (7th Cir. 1981) (P6), like *Schuchardt*, was cited by Petitioner for its statement of the underlying purposes of the LMRDA.

The one case that addressed §101(a)(1), *Smith*, not only cited *Calhoon*, but found that no violation of §101(a)(1) existed since the plaintiff had not proven that the union had engaged in any type of discrimination. Interestingly, the court in *Smith* noted:

> The rights guaranteed by the Act [LMRDA] are specific. Congress did not intend that the Act [LMRDA] be an invitation to the courts to intervene at will in the internal affairs of unions.

Smith, 493 F.2d at 1244 (citation omitted).

Clearly, the Third Circuit's application of *Calhoon* to the facts in this case is not in conflict with the decisions cited by Petitioner in support of his "conflict in the Circuit Courts" argument.

Moreover, to the extent that Petitioner argues that *Calhoon* was a jurisdictional case and therefore the Third Circuit was wrong when it applied the holding in *Calhoon* to affirm the dismissal of Petitioner's §101(a)(1) claims, his argument is specious. This Court's decision on the jurisdictional question raised in *Calhoon* was intricately interwoven with the interpretation and analysis of §101(a)(1). Describing the means by which the Court would reach its ultimate decision on jurisdiction, Justice Black stated:

> An analysis and understanding of the meaning of §101(a)(1) . . . [is] essential to a determination of this [jurisdictional] issue.

Calhoon, 379 U.S. at 138.

The Third Circuit's reliance on *Calhoon*'s interpretation of §101(a)(1) in dismissing Petitioner's §101(a)(1) claims is unassailable. *See* Point I.A., *supra*.

In addition to his futile attempt to avoid *Calhoon*'s interpretation of §101(a)(1) by characterizing *Calhoon* as a jurisdictional case, Petitioner also attempts to escape the controlling holding of *Calhoon* by arguing that *Calhoon* was not a case which involved a violation of the free speech rights provided by §101(a)(2). This is nothing more than a red herring.

Petitioner advanced claims under both §101(a)(1) and §101(a)(2). The Third Circuit, like the District Court Judge and the Magistrate, considered and analyzed Petitioner's claims under both provisions. In doing so, each court found that Petitioner failed to substantiate a claim under either section of the LMRDA. Petitioner's contention that *Calhoon* is not applicable to his claim because *Calhoon* did not involve a §101(a)(1) and §101(a)(2) claim lacks even a semblance of merit.

The Third Circuit's decision in this case affirming the dismissal of Petitioner's §101(a)(1) claims is consistent with this Court's holding in *Calhoon* and is not in conflict with the decisions in other circuits. The Petition for Writ of Certiorari should be denied.

B. The Third Circuit Did Not Rule That §101(a)(2) Applies Only In The Context Of Union Election

In pursuing his ineffective effort to persuade this Court that a conflict exists between the Third Circuit's interpretation to §101(a)(2) in this case and the decisions of other circuits with respect to §101(a)(2), Petitioner completely mischaracterizes the Third Circuit's decision. In apparent recognition that a frontal attack on the Third Circuit's decision is impossible, Petitioner attempts to soften his argument by couching it as follows:

> The *implication* in the Third Circuit's holding that the free speech provisions of §101(a)(2) apply only in the context of a union election . . . conflicts with decisions in [other circuits]. (P7-8) (emphasis added).

Moreover, Petitioner's mischaracterization of the Third Circuit's §101(a)(2) analysis intentionally ignores the Third Circuit's description of the claims advanced by Petitioner in the Conery §101 Complaint. In the Statement of Facts section of its opinion, the Third Circuit specifically noted:

> Conery maintains that various officers of Local 464A organized and executed a campaign of harassment against him in response to Conery's dissident activities in Local 464A, including Conery's decision to run for president in Local 464A's elections in 1989 and 1992. According to Conery, this harassment included (a) the filing of a civil RICO lawsuit in retaliation for Conery's dissident union activities; (b) the filing of an assault charge in Municipal Court to "convince" him to stop participating in union affairs; and (c) the verbal and physical harassment of Conery dating back to April of 1987 in order to suppress dissent within the union. (Footnote omitted).

(Pet. App. at 5a).

It is clear from the foregoing that the Third Circuit understood, without question, that Petitioner's allegations included claims that as a result of his dissident activities, he became the subject of a campaign of harassment which was allegedly designed to suppress dissent within the Union. (Pet. App. at 5a). Nowhere in the Third Circuit decision did that court ever suggest that Petitioner's §101(a)(2) claims were limited only to his activities relating to Union elections. To the contrary, the Third Circuit recognized that Petitioner's claims encompassed a wide array of allegations of harassment, some of which he claimed were designed "to 'convince' him to stop participating in union affairs" while others "dating back to April of 1987" were designed to suppress dissent within the Union. (Pet. App. at 5a).

In his Petition, Petitioner ignores the fact that the summary judgment record upon which the Third Circuit based its decision dismissing Petitioner's §101(a)(2) claims, unquestionably revealed that, notwithstanding Petitioner's

allegations, Petitioner had not and could not prove a violation of §101(a)(2).

In recognition of the indisputable nature of the Third Circuit's holding as it was written by that court, Petitioner stoops to inventing a "holding" that bears no resemblance to the Third Circuit's ruling in this case and is nothing more than a transparent attempt to bolster his "conflict in the Circuit Courts" argument. In that regard, Petitioner claims that the Third Circuit "held" the following with respect to his §101(a)(2) claims:

> The Third Circuit in this case *held* that the free speech guarantees of Title I provide a statutory cause of action *only* for dissenting union members who succumb to union harassment, but not for the Conerys of this world who bravely persist to the end by running for union office and supporting opposition candidates. (footnote omitted) (emphasis added) (P9–10).

Petitioner's gross mischaracterization of the Third Circuit's ruling[8] is brought into sharp focus when Petitioner's "holding" is juxtaposed against the Third Circuit's actual ruling which pronounced:

> As set forth in detail in the Report, Conery participated in union elections and spoke his mind. He ran for office and supported other candidates. None of the actions of the Local 464A officials interfered with Conery's rights to vote for and nominate candidates, nor did he present evidence establishing interference with the democratic governing of the union. The Report did not mischaracterize the facts or misinterpret the law and was properly adopted by the District Court.

(Pet. App. at 8a).

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[8] In accordance with Rule 15.2 of the Supreme Court Rules, Respondents point out that Petitioner's version of the Third Circuit's holding with respect to his §101(a)(2) claims is perceived by Respondents to be a misstatement.

Clearly, the absence of any resemblance between the Third Circuit's actual ruling and Petitioner's characterization of the holding is startling. Petitioner's motive for this mischaracterization is found in the Fifth Circuit case which he claims is in conflict with the Third Circuit's decision. In *Guidry v. International Union of Operating Engineers, Local 406*, 882 F.2d 929 (5th Cir. 1989), the court noted with respect to §101(a)(2) that:

> The statute itself speaks of the right of every union member to "express any views, arguments or opinions," 29 U.S.C. §411(a)(2), . . . and does not limit such expression to one occurring in the context of a union election.

Guidry, 882 F.2d at 936.

Again, the Third Circuit's opinion did not directly, indirectly, or by implication, hold that the free speech provisions of §101(a)(2) is limited to speech relating directly to a union election. As set forth above, the Third Circuit's opinion summarized the facts set forth in detail in the Magistrate's Report. (*See* Pet. App. at 13a to 20a). Both the Third Circuit's opinion, as well as the Statement of Facts in the Report, make it absolutely clear that the Third Circuit, in rendering its opinion, was addressing all of Petitioner's claims, not just those limited to his complaints relating directly to the Local's elections.

Petitioner's attempt to "bootstrap" an argument that a "conflict in the Circuit Courts" exists by misrepresenting the substance of the Third Circuit's holding with respect to Petitioner's §101(a)(2) claims is calculating, intellectually dishonest and meritless.

Furthermore, the Circuit Court decisions alleged by Petitioner to be in conflict with the Third Circuit decision here, present no such conflict. *Guzman v. Bevona*, 90 F.3d 641 (2d Cir. 1996) (P8), involved a claim by a union member against his union, its president and various union officers alleging a violation of §101(a)(2) based upon the prolonged surveillance of the union member by a private investigating firm hired by the union. The Second Circuit upheld a jury verdict that the surveillance of the plaintiff

had the effect of infringing on his right to free speech and thus violated §101(a)(2). *Id.* at 649. The *Guzman* court did not discuss or apply *Lynn*. Moreover, in affirming the jury verdict rendered in *Guzman*, the Second Circuit distinguished an earlier Second Circuit case, *Newman v. Local 1101, Communications Workers*, 570 F.2d 439 (2d Cir. 1978), a case which is on all fours with the matter presently before this Court.[9]

Guzman dealt with a set of facts not even remotely similar to those in this matter. The Second Circuit's decision in *Guzman* is not in conflict with the Third Circuit's opinion. In fact, the Second Circuit's ruling in *Newman* is entirely consistent with the Third Circuit's decision here.

In *Aircraft Mechanics v. Transport Workers Union*, 98 F.3d 597 (10th Cir. 1996) (P8), the Tenth Circuit upheld the trial court's determination that the union's suspension of the individual plaintiff's membership rights was reasonable. The court found that §101(a)(2) guarantees a

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[9] In *Newman*, the Second Circuit found no interference with plaintiff's §101(a)(2) rights where plaintiff's exercise of those rights was not interrupted. Like Petitioner, Newman historically had a turbulent relationship with his union's management, allegedly arising from his continued opposition to the incumbent officers. Like Petitioner, Newman spoke out against the incumbents, distributed literature critical of their actions and ran as an opposition candidate in the union election. During this same period of time, the union decertified Newman from his position as an elected shop steward. As a result of his decertification, Newman filed suit seeking relief under §101(a)(2) of the LMRDA. *Id.* at 448-449.

The court in *Newman* found that "Newman continued to exercise his free speech rights as a union member, conducting vigorous campaigns for greater democratization in opposition to Local 1101's incumbent leadership." Consequently, the court held:

> In view of this unique record, in which identical conduct by the defendants had not deterred Newman or any other union members from exercising their rights under LMRDA, we do not believe that judicial intervention is necessary or justified. *Id.* at 448.

union member the right to meet and assemble freely and to express views, arguments or opinions but also recognized that the statute provides that "Nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal and contractual obligations." *Id.* at 600. In *Aircraft Mechanics*, the individual plaintiff engaged in "dual unionism" when, while a member of the defendant Transport Workers Union, he executed an election authorization card on behalf of Aircraft Mechanics. This conduct violated the Transport Workers Union's constitutional provisions which prohibited advocating withdrawal from the union or promoting a rival union. In affirming the dismissal of the §101(a)(2) claims advanced by the individual plaintiff, the Tenth Circuit determined that the Transport Workers Union's constitutional provision was reasonable and that the individual plaintiff's conduct was contrary to the "institutional interests of a union in which he voluntarily retained membership." *Id. Aircraft Mechanics* does not in any way support Petitioner's "conflict in the Circuit Courts" argument.

Finally, in *Black v. Ryder/P.I.E. Nationwide,* 970 F.2d 1461 (6th Cir. 1992) (P8), the Sixth Circuit affirmed (in relevant part) a jury verdict in favor of the plaintiff who claimed that the union violated §101(a)(2) by punishing the plaintiff for organizing a picket line at the union hall opposing union leadership. As a result of the plaintiff's actions, he and others were disciplined and subjected to employment-related reprisals. The Sixth Circuit's action, like the action of the Second Circuit in *Guzman*, affirming a jury verdict in a case whose facts bear no similarity to the facts in this matter, does not advance Petitioner's argument. The fact sensitive decision in *Black* is not in conflict with the Third Circuit's decision here.

The Third Circuit's decision in this case affirming the dismissal of Petitioner's §101(a)(2) claims is not in conflict

with §101(a)(2) decisions in other Circuits. The Petition for Writ of Certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN M. AGNELLO
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GILFILLAN, CECCHI,
STEWART & OLSTEIN
6 Becker Farm Road
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(973) 994-1700
Attorneys for Respondents

Dated: September 27, 2002

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

John M. Agnello (JMA0338)
CARELLA, BYRNE, BAIN, GILFILLAN,
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6 Becker Farm Road
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(973) 994-1700
Attorneys for Defendants

WILLIAM J. CONERY, et al., Plaintiffs, v. JOHN NICCOLLAI, JR., et al., Defendants.	CIVIL ACTION NO. 92-840 (JAG) Consolidated **JUDGMENT** (Filed Sep. 27 2001)

This matter having come before the Court for the purpose of entering Judgment pursuant to Fed. R. Civ. P. 58 based upon a series of summary judgment orders which were previously filed in this consolidated action on September 27, 1994 (Hon. John C. Lifland, U.S.D.J.), March 31, 1998 (Hon. Joseph A. Greenaway, Jr., U.S.D.J.), May 20, 1998 (Hon. Joseph A. Greenaway, Jr., U.S.D.J.), May 20, 1998 (Hon. Joseph A. Greenaway, Jr., U.S.D.J.), and May 20, 1998 (Hon. Joseph A. Greenaway, Jr., U.S.D.J.), and an order filed on June 29, 2001 (Hon. Joseph A. Greenaway, Jr., U.S.D.J.) entering a monetary judgment in favor of defendant Local 464A, United Food and Commercial Workers

Union and against plaintiff Frank A. Fusco, and all issues in this consolidated action having been duly heard and decisions having been rendered,

It is on this 27th day of September 2001, Ordered and Adjudged as follows:

That the plaintiffs, William J. Conery, Frank A. Fusco, and Kenneth Burdge, take nothing and that their complaints in this consolidated action be dismissed on the merits.

That the defendant, Local 464A, United Food and Commercial Workers Union, recover the sum of $339,191.41 on its counterclaim against Frank A. Fusco, with interest thereon as provided by law, together with costs as taxed by the Clerk.

/s/ Joseph A. Greenaway, Jr.
JOSEPH A. GREENAWAY, JR.,
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2870

WILLIAM J. CONERY; FRANK A. FUSCO;
KENNETH BURDGE

v.

JOHN NICCOLLAI, JR., individually and in his official capacity as President of Local 464A, Food and Commercial Workers Union, AFL-CIO; RAMON RANDO, individually and in his official capacity as Secretary-Treasurer of Local 464A; GRIFF MCELROY, individually and in his capacity as Recorder of Local 464A; GEORGE PLESA, individually and in his official capacity as Chairman of the Executive Board of Local 464A; FRANK HANLEY, individually and in his official capacity as Contract Administrator; FRANK DICHRISTINA; DONALD LIGON; WILLIAM WRIKER, individually and in their official capacities as Business Agents of Local 464A; UNITED FOOD COMMERCIAL WORKERS UNION, AFL-CIO; SHOPRITE SUPERMARKETS, INC.; WALTER BIERNACKI, individually and in his official capacity as Vice President of Local 464A; WAYNE WILLIAMS, individually and in his capacity as Director – Pension & Prescription Benefits of Local 464A; JOHN T. NICCOLAI, SR., individually and in his capacity as Trustee of the Local 464A Pension Fund; LOCAL 464A, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; LOCAL 464A PENSION FUND ADMINISTRATOR AND BOARD OF TRUSTEES; MARTIN QUINN, in their capacity as administrators and trustees of the Local 464A Pension Fund; GILBERT C. VUOLO, in

their capacity as administrators and trustees of the Local 464A Pension Fund; DEWEY CANNELLA, in their capacity as administrators and trustees of the Local 464A Pension Fund; ISADORE ZALKIN, in their capacity as administrators and trustees of the Local 464A Pension Fund

v.

JOHN NICCOLLAI, JR.; RAMON RANDO; GRIFF MCELROY; GEORGE PLESA; FRANK HANLEY; FRANK DICHRISTINA; DONALD LIGON; WILLIAM WRIKER; WAYNE WILLIAMS; JOHN T. NICCOLAI, SR.; MARTIN QUINN; GILBERT C. VUOLO; DEWEY CANNELLA; ISADORE ZALKIN; WALTER BIERNACKI,

Third Party Plaintiffs

v.

HAROLD KRIEGER, The Estate of Harold Krieger; STEPHANIE KRIEGER; LOWELL HARDWOOD, as Executors of the Estate of Harold Krieger,

Third Party Defendants

(D.C. No. 92-cv-00840)

FRANK A. FUSCO; KENNETH BURDGE

v.

JOHN T. NICCOLAI, JR., individually and in his capacity as President of local 464A, United Food and Commercial Workers International Union, and as Trustee of the Local 464A Pension Fund; RAMON RANDO, individually and in his capacity as Secretary-Treasurer of Local 464A and as Trustee of the Local 464A Pension Fund; GRIFF MCELROY, individually and in his capacity as Recorder of Local 464A; FRANK HANLEY, individually and in his

capacity as Contract Administrator of Local 464A; WAYNE WILLIAMS individually and in his capacity as Director – Pension & Prescription Benefits of Local 464A; JOHN T. NICCOLAI, SR., individually and in his capacity as Trustee of the Local 464A Pension Fund; LOCAL 464A, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; LOCAL 464A PENSION FUND ADMINISTRATOR AND BOARD OF TRUSTEES; WALTER BIERNACKI, individually and in his capacity as Vice President of Local 464A and as Trustee of the Local 464A Pension Fund; MARTIN QUINN, in their capacity as administrators and trustees of the Local 464A Pension Fund; GILBERT C. VUOLO, in their capacity as administrators and trustees of the Local 464A Pension Fund; DEWEY CANNELLA, in their capacity as administrators and trustees of the Local 464A Pension Fund; ISADORE ZALKIN, in their capacity as administrators of the Local 464A Pension Fund;

(D.C. No. 92-cv-01458)

William J. Conery,
Appellant

Appeal from the United States District Court
for the District of New Jersey, Newark
(D.C. Civ. Nos. 92-CV-840 & 92-CV-1458)

Before: SCIRICA and COWEN, *Circuit Judges*,
RESTANI*, *Judge*, United States
Court of International Trade

AMENDED JUDGMENT

This cause came on to be heard from the United States District Court for the District of New Jersey, Newark.

On consideration whereof, it is now hereby ADJUDGED and ORDERED by this court that the Rule 58 judgment of the district court entered on September 27, 2001, be and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

/s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

DATED: May 28, 2002

Costs taxed in favor of Appellees
John Niccollai, et al. as follows:

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* Honorable Jane A. Restani of the United States Court of International Trade, sitting by designation.

Briefs	$ 135.60
44% of Appendix	$1,627.34
Sales Tax	$ 8.14
TOTAL	$1,771.08

Certified as a true copy and issued in lieu of a formal mandate on May 28, 2002

Teste: /s/ Marcia M. Waldron

Clerk, United States Court of Appeals for the Third Circuit